benefit of additional information about the toxicity of laetrile and its particular function in cancer patients that had emerged in the year prior to the case.[24] The Court upheld the FDA's authority to regulate both the safety and efficacy of new drugs, and specifically its authority to maintain the FDA's authority to regulate laetrile via its conventional gatekeeping mechanisms.[25]

In the years before the AIDS crisis, compassionate use and single patient exceptions were primarily ad hoc tools the FDA possessed to grant very sick patients access to experimental drugs.[26] The FDA made clear in 1985 that it would allow compassionate use access to antiviral treatments that were already used abroad, in part due to embarrassment in the wake of a story that actor Rock Hudson had travelled to France to receive antiviral treatment given its unavailability in the U.S.[27] It became clear over the course of the 1980's, though, that these tools were profoundly insufficient for the scope of the AIDS crisis and its attendant suffering.

C. AZT

The drug company Burroughs Wellcome ("Burroughs") became involved with AIDS treatment in the early 1980's. Patients with AIDS typically died of opportunistic infections that took advantage of weakened immune systems, and Burroughs had a reputation for specializing in rare diseases, including a number of these opportunistic infections.[28] In the early 1980's, an organic chemist at Burroughs, Janet Rideout, began studying a compound synthesized by a

[24] 377 U.S. 994 (1964). *See also id.* at 444–45. Cancer patients often take antiemetics, which prevents them from throwing up as a method to remove high levels of cyanide released laetrile in combination with almonds and other common health foods. This puts that patient group at risk from cyanide poisoning from laetrile in a way that other people would not be. *Id.*
[25] *Id.* at 445.
[26] LEWIS P. GROSSMAN, *AIDS Activists, FDA Regulation, and the Amendment of America's Drug Constitution, in* SELECTED WORKS OF LEWIS P. GROSSMAN 1, 16 (2016).
[27] CARPENTER, *supra* note 6, at 453.
[28] *See* Brian O'Reilly & Nora E. Field, *The Inside Story of the AIDS Drug*, FORTUNE MAG. (Nov. 5, 1990), https://money.cnn.com/magazines/fortune/fortune_archive/1990/11/05/74308/ (noting the history and reputation of Burroughs prior to its development of AZT). This article provides a contrapuntal, contemporaneous accounting of a popular opinion on Burroughs' role in creating and marketing AZT. That perspective claims that the drug company that worked hard to do good nonetheless suffered from "those schoolyard bullies": federal regulators, Congress, and, most significantly, people with HIV. *Id.*

Michigan Cancer Foundation researcher in 1964, azidothymidine ("AZT").[29] She flagged AZT as a compound that might have utility in combatting AIDS after a promising petri dish experiment, and Burroughs sent samples to the National Cancer Institute's Dr. Sam Broder. [30] Burroughs completed preclinical trials on AZT in 1984.[31]

Burroughs met with the FDA in 1985 at a "pre-IND" meeting to discuss plans for clinical trials.[32] Its IND was approved in a week, and it began its Phase 1 trial in July 1985.[33] In 1985, Burroughs got incredibly positive feedback from its Phase 1 trial: AZT stopped the replication of HIV in fifteen of the nineteen enrolled patients, increasing T-cell counts as well.[34] Both Burroughs and its primary regulator were left with a decision about how to move forward with the first potentially effective treatment for HIV/AIDs; by that time, about fifty-five hundred Americans had died of the disease.[35] The drug company determined that it would continue with the standard trial process, initiating a Phase 2 trial in February 1986.[36] During the Phase 2 trial of AZT, 19 of 137 placebo group members died, while just one of the patients out of 145 on AZT died.[37] In consultation with the FDA, Burroughs ended the trial early, given ethical concerns with maintaining a placebo group alongside an efficacious treatment for a deadly disease.[38]

[29] *Id.*
[30] *Id. See also* Alice Park, *The Story Behind the First AIDS Drug*, TIME MAG. (Mar. 19, 2017), https://time.com/4705809/first-aids-drug-azt/.
[31] O'Reilly, *supra* note 28.
[32] CARPENTER, *supra* note 6, at 454.
[33] *Id.*
[34] *Id.*
[35] *Snapshots of An Epidemic: An HIV/AIDS Timeline*, AMER. FOUND. FOR AIDS RSCH., https://www.amfar.org/about-hiv-aids/hiv-aids-snapshots-of-an-epidemic/ (last visited June 11, 2023).
[36] REPUTATION, *supra* note 6, at 454.
[37] *Id.*
[38] *Id.*

This trial remains contentious to the present day. First, the Phase 1, which is meant to target a drug's safety and toxicity, was communicated broadly as demonstrating AZT's efficacy.[39] In addition, because the Phase 2 trial was cut short and no Phase 3 trial was done, the safety and efficacy data about AZT spoke only to the very short-term.[40] Considering the abbreviated trials, though, the assigned FDA reviewer was pleased about the quality of the data: "there have been no limitations imposed by the availability of other drugs or therapies. The latter fact, of course, adds to the urgency of the situation."[41] The FDA also struggled with the fact that there had been a single trial in light of the statutory requirement that a drug have "adequate and well-controlled investigations" in advance of approval, where the plural "investigations" seemed to demand more than a single abbreviated Phase 2 trial.[42]

As the FDA mulled over AZT, it took major intermediary steps to bolster the drug. First, it granted compassionate use of AZT to about four thousand people very sick with AIDS.[43] This removed some pressure on the FDA to expedite its approval of AZT even more. Second, FDA scientists presented the drug to its Advisory Committee on Infective Drug Products, seeking "a clear and unambiguous statement from the Committee that it would back up the solidity of [the FDA scientists'] review and the accuracy of [the FDA scientists'] judgments."[44] The committee voted twelve to one to sanction the final approval of AZT.[45]

[39] Donna A. Messner, *AZT and Drug Regulatory Reform in the Late 20th-Century U.S., in* WAYS OF REGULATING DRUGS IN THE 19TH AND 20TH CENTURIES 228, 230 (Jean-Paul Gaudillière & Volker Hess ed., 2013).
[40] CARPENTER, *supra* note 6, at 454.
[41] *Id.* at 455 (quoting Emily Cooper).
[42] *Id.* at 456.
[43] *Id.*
[44] *Id.*
[45] *Id.* at 457.

The FDA approved AZT in March 1987, just twenty months after in-vitro trials.[46] It quickly became clear that AZT had the role of a life-extender, not a lifesaver: in 1990, the thought was that if a person with AIDS-related pneumonia had a year to live without AZT, that person might live twenty-one months with it.[47] It also had severe side effects, including serious cardiac dysfunction.[48] Burroughs charged about eight thousand dollars a year for AZT. At the end of 1987, after a significant outcry, Burroughs slashed the price for AZT by twenty percent.[49] In 1989, ACT UP activists staged a well-publicized protest at Burroughs' headquarters in North Carolina. Burroughs subsequently cut the price for AZT by twenty percent for a second time in September 1989; a reduced minimum effective dosage reduced the cost even more, bringing it down to around three thousand dollars.[50]

Another very important AZT trial happened in 1991. The AIDS Clinical Trials Group Protocol 076 study aimed to determine whether AZT would prevent HIV from passing from a mother to an infant if administered late in pregnancy.[51] The study involved nearly five-hundred pregnant women, and it "demonstrated that a brief regimen of AZT administered to a mother before and during delivery, along with a small dose for the newborn, decreased the perinatal transmission rate by nearly seventy per cent."[52]

This drug trial presented thorny issues that very much troubled portions of the AIDS Coalition to Unleash Power (ACT UP), the activist group described in the next section. Because AZT was effective for only so long as a "monotherapy," women enrolled in the trial might have

[46] Alice Park, *The Story Behind the First AIDS Drug*, TIME MAG. (Mar. 19, 2017), https://time.com/4705809/first-aids-drug-azt/.
[47] O'Reilly, *supra* note 28.
[48] CARPENTER, *supra* note 6, at 460.
[49] O'Reilly, *supra* note 28.
[50] *Id.*
[51] Michael Specter, *How ACT UP Changed America*, THE NEW YORKER (June 7, 2021), https://www.newyorker.com/magazine/2021/06/14/how-act-up-changed-america.
[52] *Id.*

diminished the efficacy of the single treatment for HIV by participating in the trial. The portion of ACT UP troubled by the trial was disproportionately likely to have a background in reproductive justice, true of many of the lesbians who participated in AIDS activism.[53] The perspective prioritized by these activists—that the study was unacceptable because it placed more value on the future life of the fetus than the current life of the mother—is intuitive in the context of abortion and other reproductive justice issues. On the other hand, participating in the trial gave women a higher standard of care than they likely experienced elsewhere, and the information provided by the study has proven exceptionally important in treating pregnant women in the U.S. and abroad.[54]

D. Patient Advocacy

This discussion focuses on the highest profile group of AIDS activists: the Treatment and Data Committee ("T&DC") of ACT UP in New York City.[55] ACT UP, still well-known for its provocative protests, simultaneously embraced an "insider" and "outsider" approach, with the Treatment and Data Committee typifying the "insider" approach. The committee met weekly at the apartment of Mark Harrington, later given a MacArthur "genius" grant for his work on AIDS; as the group continued to meet, "[h]e and other members came to know the arcane rules and bureaucracy of the F.D.A. better than most of the officials who worked there."[56]

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[53] *Id.*
[54] *Id.*
[55] To what extent the largely white and male T&DC deserves continued emphasis in the history of ACT UP and HIV activism is taken up well in Sarah Schulman's *Let the Record Show*. It is certainly true that a focus on TD&C should not be read to minimize the role of other activists, and that major constituencies of ACT UP looked demographically different from the men often seen as the face of HIV activism: Peter Staley (a stock trader whose brother later served as the CEO of Barclay's), Larry Kramer (a Yale-educated playwright nominated for an Academy Award for his adaptation of a D.H. Lawrence novel), and Mark Harrington (a Harvard-educated AIDS professional who has received a Gates Foundation grant among other honors). *See generally* Schulman, *supra* note 11.
[56] Specter, *supra* note 51.

People with AIDS in the T&DC began conceptualizing their work as a function drug approvals and information production early; autodidact activist Jim Eigo, a playwright by training, said at a conference during the heart of the crisis that he measured the success of his activism by "the number of new therapeutic agents delivered and the amount of new knowledge garnered about approved therapies."[57] And even (perhaps especially) after the approval of AZT, activists posited additional changes they hoped to see in FDA drug approvals. The FDA continued to distinguish between a serious illness with no treatments and a serious illness with even one available treatment, wherein the first category received focus and attention as the FDA attempted to meet "unmet medical need."[58] This influenced what "Therapeutic Potential" a subject was given and therefore the emphasis placed on it by the FDA.[59] Given that AZT was merely a life-extender, not a cure for the disease or a long-term treatment, activists wanted the FDA to feel the urgency about new treatments it had felt before approving AZT.

Jim Eigo, the playwright and activist, discussed another lever to compensate for expediting drug approvals in an academic journal in 1990: loosening the clinical standards for Phase 1 trial participants.[60] In part, he argues that the fantasy of limiting Phase 1 trials to healthy participants has been destroyed by Phase I trials that include attempting to learn about things like minimum effective doses, and in a patient population that typically takes myriad prescriptions (particularly in the wake of the approval of AZT).[61] In addition, maintaining those standards seemed simply unworkable: Eigo describes a Sloan Kettering trial where a hundred and fifty

[57] James J. Eigo, *Expedited Drug Approval Procedures: Perspective from an AIDS Activist*, FOOD, DRUG, COSMETIC L.J. 377, 377 (1990).
[58] CARPENTER, *supra* note 6, at 459.
[59] Erin E. Kepplinger, *FDA's Expedited Approval Mechanisms for New Drug Products*, 34 BIOTECHNOLOGY L. REV. 15, 23 (Feb. 1, 2015).
[60] Eigo, *supra* note 57, at 382.
[61] *Id.*

patients were screened and only three were found eligible to participate.[62] For Eigo, the trouble with drug studies also pointed to the need to wider access to primary care: patients who do not have primary care physicians are not ideal participants in drug trials.[63] Patients and their doctors sometimes tackled the challenges of the placebo-trial system by "consciously undermin[ing] clinical trial protocols to the point of hijacking them for therapeutic purposes."[64] This could look like simply lying about medical history to get into a trial, or replacing placebos with treatment drugs secured illicitly.[65]

E. Outcome

AIDS activists won significant changes in the FDA's drug approval context, in part through the intersection of their "insider" and "outsider" approaches. While one group of activists unfurled a giant condom over Jesse Helms' house, or chained themselves to the balcony of the New York Stock exchange, another met with Anthony Fauci and attended AIDS conferences as patient–experts. These changes constitute the bulk of modern expedited drug approval processes, from the parallel track to the fast track. And they cut deeper, changing the way the FDA treated endpoints on behalf of speeding up access to drugs.

First, the AZT trial established the ground from which treatment investigational new drugs sprung. The broad compassionate use given to sick people in advance of formal approval of AZT modeled this approach. Just a week before AZT's formal approval, in March 1987, FDA Commissioner Young announced forthcoming proposed regulations that would expand access to drugs treating "immediately life-threatening" or "serious" conditions where "no alternative

[62] *Id.*
[63] *Id.* at 383.
[64] CARPENTER, *supra* note 6, at 461.
[65] *Id.*

therapies exist."[66] The new treatment IND rules were published in May 1987. This is also called "parallel track" because it opens a track to treatment use of drugs that runs alongside the traditional approval process. The actual regulatory "parallel track," however, applies just to HIV/AIDS drugs.[67] The parallel track allowed Bristol Myers Squibb to distribute its AIDS treatment, DDI, to patients who could not take AZT, the only other available treatment, even though it had only completed a Phase 1 trial.[68] The FDA drew the connection explicitly in the Preamble, noting that "[t]hese procedures are modeled after the highly successful development, evaluation, and approval of zidovudine, the first drug approved to treat the AIDS virus."[69]

This group of regulatory changes in Subpart E eventually served as a home for the new fast-track designation in 1997. To receive the designation, the drug company must first request fast track. The FDA then has sixty days to review that request and determine whether it meets the predicate standard for fast-track designation: that the drug fills an unmet medical need in a serious condition.[70] Even if the FDA grants the designation, it retains the power to revoke it if later data suggests these conditions are not met.[71] Among other benefits, the designation provides opportunities for a drug sponsor to meet and discuss issues related to the drug with the FDA in advance of a submitted NDA.[72]

Second, AIDS activists were involved in shaping the FDA's Accelerated approval pathway, established in 1992, which allows the FDA to approve a drug effective as to a

[66] *Id.* at 458.
[67] *Id.*
[68] Jonathan L. Iwry, *FDA Emergency Use Authorization From 9/11 to COVID-19: Historical Lessons and Ethical Challenges*, FOOD AND DRUG L.J. 337, 342 (2021).
[69] Messner, *supra* note 39, at 231.
[70] Kepplinger, *supra* note 59, at 31.
[71] *Id.*
[72] *Id.*

"surrogate endpoint."[73] In the context of AIDS, this meant taking T-cell counts or viral load as an endpoint instead of more traditional clinical benefits.[74] Because some serious conditions take a long time to move from diagnosis or symptom emergence to a traditional ultimate clinical endpoint, such as death, allowing drug approval on the basis of surrogate endpoints can significantly reduce approval times.[75]

[73] *See id.* at 23 (describing the regulatory route that allows the FDA to take an outcome other than mortality as significant for purposes of evaluating a drug's efficacy).
[74] Specter, *supra* note 51.
[75] *See* Kepplinger, *supra* note 59, at 25 (noting the benefits of permitting surrogate endpoints).

Applicant Details

First Name	**Noah**
Last Name	**Cohen**
Citizenship Status	**U. S. Citizen**
Email Address	**nc600@berkeley.edu**
Address	**Address** Street **1204 Curtis St** City **Berkeley** State/Territory **California** Zip **94706**
Contact Phone Number	**6108649108**

Applicant Education

BA/BS From	**Tufts University**
Date of BA/BS	**May 2017**
JD/LLB From	**University of California, Berkeley School of Law** **https://www.law.berkeley.edu/careers/**
Date of JD/LLB	**May 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Berkeley Technology Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Winner of the McBaine Honors Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Gellie, Jennifer
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am a rising 3L at Berkeley Law applying for the 2024 clerkship in your chambers. I am most excited to clerk in your chambers because, like you, I am originally from the Philadelphia suburbs. As my wife and I intend on returning to Philadelphia and raising our family there, I am very excited about the prospect of starting my legal career with you.

I am confident I will make an excellent clerk in your chambers because I have developed an organized, thorough, and efficient task-completion process through my professional experiences. These skills allowed me to flourish in each of my prior roles. For example, as a paralegal, I was entrusted to lead the paralegal team in preparing our exhibits in advance of trial and at the Department of Justice I earned the responsibility of independently reviewing and identifying potential foreign agents and subsequently drafting each respective notice.

In conjunction with my organized and thorough work product, my research skills developed across my undergraduate and graduate research assistant positions. These experiences contributed to my success in publishing a student comment on the relationship between the military, executive orders, and climate change as a 1L and culminated in my proudest law school moment - winning Berkeley's McBaine Honors Moot Court Competition. Not only did I love the challenge of writing and arguing, but the competition itself inspired me to want to clerk. I really enjoyed analyzing the facts, diving into the applicable law, and drafting an argument, and I am certain that clerking will not only require these same skills, but will provide similar intellectual stimulation.

Included in my application are my resume, writing sample, transcript, and letters of recommendation from Erwin Chemerinsky (echemerinsky@law.berkeley.edu), Lindsay Saffouri (510-643-2323, lsaffouri@law.berkeley.edu), and Jennifer Gellie (202-233-0785, jennifer.gellie@usdoj.gov). I am happy to provide any further information and very much appreciate your consideration.

Sincerely,

Noah Cohen

Noah Cohen

1204 Curtis St. • Berkeley, CA 94706 • (610) 864-9108 • nc600@berkeley.edu

EDUCATION

University of California, Berkeley, School of Law, Berkeley, CA
J.D. Candidate, May 2024
Honors: 2023 Berkeley McBaine Honors Moot Court Champion; Prosser Award in Advanced Legal Writing; 1L Academic Distinction - Top 33%; 2L Academic Distinction – Top 25%.
Activities: *Berkeley Law and Technology Journal*, Notes & Comments Editor; Digital Rights Program, Member; FosterEd, Member; Jewish Student Association at Berkeley Law, Speaker Chair.

Georgetown University, Walsh School of Foreign Service, Washington, D.C.
M.A. in Security Studies, May 2021

Tufts University, College of Liberal Arts, Medford, MA
B.A., *magna cum laude*, in Political Science and Psychology, May 2017
Honors: Pi Sigma Alpha, Psi Chi, Dean's List

EXPERIENCE

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY May 2023 – Aug. 2023
Incoming Summer Associate

Department of Justice, National Security Division, Washington, D.C. Aug. 2022 – Dec. 2022, Aug. 2023 – Dec. 2023
Law Student Volunteer (Remote) – Counterintelligence and Counter Export Control Section
Researched legislative history and drafted an advanced notice of proposed rulemaking. Identified potential foreign agents and drafted registration advisory notices. Conducted legal research on *Brady* violations and national security statutes.

Department of Defense, Office of General Counsel, Washington, D.C. June 2022 – July 2022
Summer Honors Intern – Office of International Affairs
Researched and wrote memoranda on customary international law, focusing on the Geneva conventions. Reviewed and assessed autonomous weapons provisions in existing bodies of law.

Department of State, Bureau of Legislative Affairs, Washington, D.C. May 2020 – Jan. 2021
Intern
Researched client bureau legislation to produce bureau strategies. Drafted readouts from calls between State Department briefers and Capitol Hill staffers on events in the Middle East, several of which were sent to the White House and Secretary of State. Organized "lunch and learns" for interns with State Department personnel.

Georgetown University, Center for Security Studies, Washington, D.C. Sept. 2019 – May 2020
Research Assistant
Researched supply chain, proliferation, and interdiction in the Middle East for a counternarcotics program in Dubai. Summarized the 2019 Lebanese protest movement, identifying the relevant players, dynamics, and directions of change.

United States House of Representatives, Washington, D.C. Aug. 2018 – Sept. 2019
Staff Assistant in the Office of Jimmy Gomez and Intern in the offices of Ted Deutch and Katie Hill
Provided co-sponsorship suggestions, researched legislative issues to create district events, and helped prepare binders. Managed the intern program by organizing tasks, facilitating memorandums, and leading research assignments.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY June 2017 – Aug. 2018
Litigation Paralegal
Led a team of paralegals in coordinating and executing witness preparation materials and exhibits during, and in preparation for, trial. Assisted in the production and exchange of documents with opposing counsels.

ADDITIONAL INFORMATION

Publications: Noah Cohen, *Empowering the Military to Fight Climate Change*, 49 Ecology L. Q. __ (2022).
Interests: Philadelphia sports, summer softball, chess, cooking.

Berkeley Law
University of California
Office of the Registrar

Noah Cohen
Student ID: 3036498896
Admit Term: 2021 Fall

Academic Program History
Major: Law (JD)

Awards

Best Oralist - McBaine Moot Court Competition
Prosser Prize 2022 Fall: Advanced Legal Writing

2021 Fall

Course		Description	Units	Law Units	Grade
LAW	200F	Civil Procedure David Oppenheimer	5.0	5.0	H
LAW	201	Torts Daniel Farber	4.0	4.0	H
LAW	202.1A	Legal Research and Writing Kerry Kumabe	3.0	3.0	CR
LAW	230	Criminal Law Jonathan Simon	4.0	4.0	P

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	16.0	16.0

2022 Spring

Course		Description	Units	Law Units	Grade
LAW	202.1B	Written and Oral Advocacy **Units Count Toward Experiential Requirement** Kerry Kumabe	2.0	2.0	HH
LAW	202F	Contracts Prasad Krishnamurthy	4.0	4.0	P
LAW	220.6	Constitutional Law **Fulfills Constitutional Law Requirement** Erwin Chemerinsky	4.0	4.0	H
LAW	276.13	Cybersecurity Law and Policy Paul Schwartz	3.0	3.0	H
LAW	276.33	Regul. of & by Internet Pltfrm Pamela Samuelson	2.0	2.0	H

	Units	Law Units
Term Totals	15.0	15.0
Cumulative Totals	31.0	31.0

2022 Fall

Course		Description	Units	Law Units	Grade
LAW	207.5	Advanced Legal Writing **Fulfills 1 of 2 Writing Requirements** Lindsay Saffouri	3.0	3.0	HH
LAW	231	Crim Procedure-Investigations Erwin Chemerinsky	4.0	4.0	HH
LAW	257	Real Estate Trans.&Litigation Susan Reinstra Sean Wilkinson	1.0	1.0	CR
LAW	295	Civ Field Placement Ethics Sem **Fulfills Either Prof. Resp. or Experiential** Susan Schechter Jessica Mark Cheryl Stevens	2.0	2.0	H
LAW	295.6A	Civil Field Placement **Units Count Toward Experiential Requirement** Susan Schechter	4.0	4.0	CR

	Units	Law Units
Term Totals	14.0	14.0
Cumulative Totals	45.0	45.0

Carol Rachwald, Registrar

Berkeley Law
University of California
Office of the Registrar

Noah Cohen
Student ID: 3036498896
Admit Term: 2021 Fall

2023 Spring

Course		Description	Units	Law Units	Grade
LAW	208	Advanced Legal Research	3.0	3.0	P
		Units Count Toward Experiential Requirement			
		Michael Levy			
		Kathleen Vanden Heuvel			
LAW	220.42	Strat: Theory, Law, and Policy	2.0	2.0	IP
		Fulfills 1 of 2 Writing Requirements			
		John Yoo			
LAW	226.11	Topics National Security Law	1.0	1.0	CR
		Theresa Bridgeman			
LAW	241	Evidence	4.0	4.0	P
		Sean Farhang			
LAW	295.3J	McBaine Moot Court Competition	2.0	2.0	CR
		Units Count Toward Experiential Requirement			
		Gregory Washington			

	Units	Law Units
Term Totals	10.0	10.0
Cumulative Totals	55.0	55.0

2023 Fall

Course		Description	Units	Law Units	Grade
LAW	222	Federal Courts	3.0	3.0	
		William Fletcher			
LAW	226.8	Strat Con Lit Prop Rgts&Ec Lib	1.0	1.0	
		John Groen			
LAW	244.1	Adv Civ Pro:Complex Civil Lit	4.0	4.0	
		Andrew Bradt			
LAW	249.2	Introduction Financial Acctg	1.0	1.0	
		Susan Biglieri			
LAW	258	Estates and Trusts	3.0	3.0	
		Kristen Holmquist			

	Units	Law Units
Term Totals	0.0	0.0
Cumulative Totals	55.0	55.0

Carol Rachwald, Registrar

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KEY TO GR DES

1. Grades for cademic Years 1970 to present:

HH	–	High Honors	CR	–	Credit
H	–	Honors	NP	–	Not Pass
P	–	Pass	I	–	Incomplete
PC	–	Pass Conditional or Substandard Pass (1997-98 to present)	IP	–	In Progress
NC	–	No Credit	NR	–	No Record

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

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U.S. Department of Justice

National Security Division

Counterintelligence and Export Control Section *Washington, D.C. 20530*

May 10, 2023

I am writing to recommend Noah Cohen for a judicial clerkship. I am currently the Acting Chief of the Counterintelligence and Export Control Section (CES) in the Department of Justice's National Security Division. Prior to serving as Acting Chief, I was Deputy Chief for Foreign Malign Influence, overseeing criminal prosecutions. In both roles I was and am the Chief of the Foreign Agents Registration Act (FARA) Unit, overseeing the administrative enforcement of FARA. CES is charged with overseeing criminal investigations into violations of, among other things, espionage, economic espionage, FARA, and export control and sanctions regimes.

I was fortunate to get to know Noah in my capacity as Deputy Section Chief and FARA Unit Chief when he was an intern with CES in the Fall of 2022. Based on his stellar performance, we have invited Noah back as an intern for the 2023 fall semester.

During his time with us, Noah's research skills stood out across portfolios and assignments. Noah displayed sharp legal research skills. He asked pointed questions to identify relevant search parameters, regularly checked-in to make sure he was on the right path, and provided helpful summaries of controlling case law. His strong research skills made him a value add to his CES case teams, where he exceled.

Noah also demonstrated his aptitude for legislative research in compiling background research for a potential Notice of Proposed Rulemaking. As with his legal research on his criminal matters, Noah was thorough, utilizing all available resources and consulting various platforms to ensure compilation of a fulsome rulemaking history on the implementing regulations at issue. Noah also demonstrated his writing skills by writing a first draft of a proposed rule, which will be the starting point for a future rulemaking.

On the civil, administrative side, Noah displayed excellent critical thinking and analysis in his open-source research into whether individuals or organizations might have an obligation to register as agents pursuant to FARA. Noah not only conducted research into the conduct of potential registrants, but also helped draft letters of inquiry to those potential FARA registrants, with only minimal editing required by his supervising attorneys. Noah always learned from the edits provided and incorporated those changes in subsequent letters.

Beyond Noah's research and writing skills, I am certain Noah will make an excellent clerk because of his high level of collegiality. Despite joining us as a virtual intern, Noah endeavored to meet as many attorneys as possible during his internship. In fact, Noah worked in the office with us for the first week of his internship and made a point of stopping by the office to chat with myself and two of the attorneys he worked closely with when visiting DC later in the semester. Beyond his commitment to face-to-face meetings, Noah was an excellent communicator. He was

clear about his availability to take on new assignments, always met his deadlines, and most importantly, always asked questions when necessary to confirm he understood what was needed of him and why.

Noah's commitment to public service is evident, both in his work for us and in his prior government service. For all the above reasons, we look forward to welcoming Noah back as an intern later this year. For the same reasons, I am confident Noah will make a terrific clerk.

Sincerely,

/s/ *Jennifer K. Gellie*

Jennifer Kennedy Gellie
Acting Chief
Counterintelligence and Export Control Section
National Security Division
U.S. Department of Justice

May 20, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to highly recommend Mr. Noah Cohen for a position as your law clerk. I have gotten to know Mr. Cohen well over his two years at Berkeley Law. He was a student in two of my classes, Constitutional Law and Criminal Procedures: Investigations. I saw him argue in the final round of the Law School's moot court competition, which he won. I have read a note that he published in the Ecology Law Quarterly. And I worked closely with him in his role as an officer of the Jewish Law Students Association. Based on all of these contacts, I believe that he would be an excellent law clerk.

He is exceptionally smart and expresses himself superbly both in writing and in oral advocacy. I saw this in his exams in my classes and in his comments during class discussions. I also saw his stellar performance in the final round of the McBaine Moot Court Competition. As the judges noted, his advocacy was of the caliber of a very experienced appellate advocate.

He is an excellent writer. He published an essay in the Ecology Law Quarterly journal that discussed how executive orders can be used to direct the military to combat climate change. In the McBaine competition, he wrote an excellent 40 page brief arguing that content moderation by social media companies is protected by the First Amendment and that state regulations restricting content moderation are unconstitutional.

I also have seen that he has excellent judgment. Berkeley Law faced a difficult free speech issue in Fall 2022 as its Law Students for Justice in Palestine organization asked other groups to adopt a bylaw refusing to invite speakers who supported Israel. Mr. Cohen, as an officer of the Jewish Law Students Association, played an important role within the law school. He helped to diffuse tensions, but he also was courageous in expressing the impact of the bylaw on Jewish students. We met many times over this and I always was impressed by his common sense and his good judgment.

Based on all of these contacts, I enthusiastically recommend him for a clerkship.

Sincerely,

Erwin Chemerinsky

Erwin Chemerinsky - echemerinsky@law.berkeley.edu - 5106426483

May 2, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Application of Noah Cohen

Dear Judge Sanchez:

I am pleased to write a letter of recommendation for Noah Cohen in support of his clerkship application. I became acquainted with Noah in Fall of 2022 during his second year at Berkeley Law, as he was a student in my Advanced Legal Writing course. He received a "High Honors" grade in the course. With enrollments of just sixteen, many difficult writing projects, including a series of office memoranda and an Opposition to a Motion for Summary Judgment, this course gave me a clear picture of each student's writing, reasoning, analytical ability, and character. Noah excelled in every respect.

Noah's writing abilities place him at the top of his class. Not only did he earn a top grade in Written and Oral Advocacy, but he received the Prosser Prize (second highest grade) in my course. Advanced Legal Writing is an elective course that attracts students who love, and excel at, writing. To earn the Prosser Prize is no small achievement. This award is on top of receiving several awards and accolades for his advocacy skills in other courses and competitions, including just recently winning the McBaine Moot Court Competition.

Noah's strong research and writing skills were on full display when he was my student. He easily grasped the legal concepts we discussed. He was able to zero in on the "heart" of a case and understand how it applies in each situation. He can synthesize case law and assess which facts matter in the ultimate analysis. His objective memoranda and persuasive brief demonstrated thorough research, thorough analysis, good judgment, and a clear understanding of the problem at hand. Noah's written work was consistently crisp, clear, focused and needed little revision. He is very diligent and meticulous, and that was reflected in his brief writing.

In addition to his pleasant manner, Noah is mature, professional and kind. I believe Noah has all the qualities that make up an excellent law clerk: native intelligence, sharp critical thinking skills, ability to work and think independently, and strong oral and written communication skills. Should you wish to discuss Noah's qualifications with me further, please do not hesitate to call me at 510-643-2323.

Sincerely,

Lindsay Sturges Saffouri
Professor of Advanced Legal Writing
University of California, Berkeley School of Law

Noah Cohen's Writing Sample

The following is a brief I wrote for my advanced legal writing course. The fact pattern, while based off real events, is fictional. The formatting of this paper follows the local rules we were provided for this assignment. I received feedback from my professor, but the legal research, analysis, and writing is substantially my own.

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Attorney for Plaintiff
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. SEAN MILLER, *et al.*, d/b/a BURGER STOP, Defendants.	CIVIL ACTION NO. 22-3424

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES

TABLE OF CONTENTS

I. INTRODUCTION

For over eighty-years, the Navajo Nation was subjected to a "cultural genocide" – a forced assimilation. To preserve their culture, history and identity, the Navajo Nation now encourages its members to speak Navajo. When the Millers (Defendants) posted "Please, No Navajo" signs around their restaurant, Burger Stop – whose employees are ninety percent Navajo – and then enacted a blanket English-only policy, it struck the Navajo employees as particularly offensive and discriminatory. But the Millers were savvy and knew they could conceal their discriminatory intentions if the policy was justified as a "business necessity." The major problem with their argument though is that since the policy's enactment, Burger Stop has fewer employees, revenue has remained stagnant, and neither the workplace environment, supervision, nor customer service have improved. Even so, Defendants are relying on this specious argument in seeking summary judgment. But the Equal Employment Opportunity Commission ("EEOC"), on behalf of former and current Burger Stop employees ("Plaintiff" and "Navajo employees"), offers substantial evidence to defeat their motion and uncover the reality of their scheme.

First, Plaintiff establishes a prima facie case of disparate impact under Title VII by presenting substantial evidence that the Navajo employees were denied a privilege of employment – the ability to converse at work. The Navajo employees cannot comply with the policy because they unconsciously slip between Navajo and English and are punished for these minor slips. Plaintiff further establishes a prima facie case by proving that the policy creates a hostile work environment through its stigmatization of Navajo employees and its draconian enforcement. Second, Defendants fail to establish a business necessity. This policy will not improve the workplace because there is no evidence that anyone complained about the use of Navajo. The policy is also unnecessary for supervision as all the supervisors speak Navajo. And instead of improving customer service, the policy actually frustrates employee communications, slowing down service. Finally, Plaintiff offers several alternatives, one of which – reprimanding the offending

parties – already successfully addressed the issue of complaints. For these reasons, Defendants' motion has no basis and must fail.

II. STATEMENT OF FACTS

Sean Miller, the owner of Burger Stop, fired four employees who could not comply with his newly instituted English-only policy. Declaration of Suzanne Pierce ("Pierce Decl.") ¶¶ 6-7.

The policy at issue represents a culmination of degrading behavior to the Navajo people. *See* Declaration of Sean Miller ("Miller Decl.") ¶ 7. Prior to the adoption of the current policy, Miller had posted "Please, No Navajo" signs in Burger Stop's break room, kitchen, and dining area. *Id*. When the Navajo employees continued speaking Navajo, Brett Miller (Sean's son) consulted the EEOC website and learned that a business could adopt an English-only policy, if it was a business necessity. *Id*. ¶ 11. Thereafter, Sean Miller enacted an English-only policy that required English be spoken "at all times." *Id*. ¶ 13. Miller claimed he orally told the employees they could speak Navajo on breaks, but conveniently failed to clarify this in the written policy. *Id*. ¶ 14. Thus, employees never received guidance on where, if at all, they could speak in Navajo. *See* Pierce Decl. ¶¶ 6-8.

This policy targets an important feature of Navajo culture and substantially impacts the Navajo community because ninety percent of Burger Stop's employees and over fifty percent of its customers are Navajo. *Id*. ¶¶ 3, 6-7; Declaration of Angela Diaz ("Diaz Decl.") ¶ 6. Dr. Diaz, who received her Ph.D. in American Indian Studies and Applied Linguistics, shared that Navajo culture has been targeted through a "cultural genocide." Diaz Decl. ¶ 5. To reverse this worrying trend, the Navajo community now prioritizes speaking Navajo – a factor likely known to Miller who volunteers on the Navajo reservation, has hired hundreds of Navajo employees, and claims to have "good relations" with the Navajo community. *Id*.; Miller Decl. ¶ 5.

The employees' work environment is also directly impacted. Pierce Decl. ¶¶ 7-8, 10. One employee explained that communicating in English can make simple tasks take "two or three times as long." *Id*. ¶ 6. Another employee, Bill Redstone, was punished

with a note in his file for slipping into Navajo when he urgently tried to warn approaching customers about a wet floor. *Id*. ¶ 10. This punishment could cost him shift preferences. Miller Decl. ¶ 14. Critically, slipping into Navajo, or "code-switching," is impossible to control, especially after speaking Navajo with a customer, which Miller expects employees to do when a customer desires. Diaz Decl. ¶ 8; Pierce Decl. ¶ 8.

Despite the negative impacts, Miller claims the English-only policy was necessary to improve the workplace, stem declining sales, and retain employees. Miller Decl. ¶¶ 10, 12. Miller attributed these effects to two employees who were making "sexually suggestive comments" and engaging in "inappropriate conversations … in Navajo." Declaration of Yolanda Tsosie ("Tsosie Decl.") ¶ 4. Miller believed that an English-only policy would curb their behavior, resolve these complaints, and improve the restaurant. Miller Decl. ¶ 10. But even after implementing the policy, sales remained stagnant and Miller has failed to replace the employees he fired. Deposition of Sean Miller ("Miller Dep.") 12:5-16. Meanwhile, after Miller supposedly spoke to the offensive employees, their behavior stopped, and the workplace was "fine after that." Deposition of Lily Hunt ("Hunt Dep.") 3:23-25.

Even though the workplace improved, Miller still claims that the English-only policy is necessary to improve customer service, which is important because Miller prioritizes "[a]ccuracy" and getting the customers "good food and … fast." Miller Dep. 12:20-23. As Pierce stated though, the English-only policy hinders employees' communication. Pierce Decl. ¶ 6. Miller also argues that the policy was necessary for him to supervise his employees. Miller Decl. ¶ 12. But Miller is only in the restaurant on weekdays for a couple of hours during the lunch shift and his son is only in on weekends, while all shift supervisors are bilingual, speak Navajo, and work all the time. Miller Dep. 9:10-24. Despite the supposed importance of only speaking English, Sarah Miller (Sean's wife) and Brett (their son) ignore this policy when they are working, as Sarah likes to speak Polish to Brett "so that he can keep up his Polish." *Id*. 10:9-12. Apparently, the desire to know one's home-language is only acceptable for the American owners.

III. ARGUMENT

A. Summary Judgment Standard

Summary judgment is only appropriate when the moving party "shows that there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). The moving party bears the burden of establishing "the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In instances where the facts are disputed, the court must "view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion.'" *Scott v. Harris*, 550 U.S. 372, 378 (2007) (internal citations omitted).

B. This Court should deny summary judgment because Plaintiff establishes a prima facie case of disparate impact, Defendants fail to demonstrate any business necessity, and Plaintiff offers several reasonable alternatives.

Title VII of the Civil Rights Act of 1964 prohibits employers from "discriminat[ing] against any individual with respect to [the individual's] terms, conditions, or privileges of employment, because of such individual's race … or national origin." 42 U.S.C. § 2000e-2(a)(1) (2018). Congress's objective in "enact[ing] Title VII … was to achieve equality of employment opportunities and remove barriers that … favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971). When analyzing disparate impact claims under Title VII, courts use a three-step, burden-shifting analysis. *Connecticut v. Teal*, 457 U.S. 440, 446 (1982). First, the plaintiff must establish a prima facie case that a policy "had a significantly discriminatory impact." *Id*. Once the plaintiff has established this impact, the defendant must prove a business necessity for the policy. *Id*. Even if the defendant can show there is a business necessity, the plaintiff can still establish a disparate impact by offering a less discriminatory alternative. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). At the summary judgment stage, all that plaintiffs need to prove is that there is a genuine issue of material fact for any element of the analysis. *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1488 (9th Cir. 1993).

Plaintiff defeats summary judgment at each stage of the three-step test. First, Plaintiff offers sufficient evidence that Burger Stop denied its employees a privilege of employment and created a hostile work environment. Second, Burger Stop fails to offer any adequate business justification for their English-only policy. Finally, Plaintiff offers several less discriminatory alternatives to the English-only policy. Because there is a genuine dispute of material facts for each element, summary judgment is not appropriate.

1. Plaintiff establishes a prima facie case of disparate impact because there is substantial evidence that Burger Stop's English-only policy denies Navajo employees a privilege of employment and creates a hostile work environment.

A plaintiff establishes a prima facie case when they prove that a neutral policy causes "significant … adverse effects" on protected employees. *Id*. at 1486. Adverse effects include denying employees a privilege of employment or creating a hostile work environment. *Id*. at 1486-87. Either avenue is sufficient to establish a plaintiff's prima facie case. *Id*. Here, Plaintiff sufficiently demonstrates that the English-only policy denies Navajo employees a privilege of employment and creates a hostile work environment.

a. Burger Stop's English-only policy denies Navajo employees a privilege of employment because the employees cannot comply with the policy and are punished for minor slips.

An important privilege of employment is the "ability to converse and make small talk." *Id*. at 1487. When employees cannot comply with an English-only policy, they lose their ability to converse, which denies them this privilege of employment and creates a disparate impact. *Id*. Individuals cannot "readily comply" with an English-only policy when they have "difficulty using [a] language" not spoken at home and when an employer punishes "minor slips." *Id*. Analyzing whether someone "speaks such little English as to be effectively denied the privilege is a question of fact for which summary judgment is improper." *Id*. at 1488.

Defendants primarily rely on *Spun Steak*, where the Ninth Circuit held that a carved-out English-only policy did not create a disparate impact because employees could "readily comply" and the policy did not penalize "minor slips." *Id*. Spun Steak – a

meat production company – never expected its employees to interact with customers. *Id*. at 1483. Nevertheless, to improve worker safety and promote racial harmony, Spun Steak instituted a narrow English-only policy. *Id*. The policy included exceptions for bilingual employees and a woman who did not speak English. *Id*. at 1483, 1488. Further, the policy was barely enforced; several workers continued speaking "Spanish without incident." *Id*. at 1483. The Ninth Circuit found that all bilingual employees could easily comply as they never needed to switch languages and were not punished for minor slips. *Id*. at 1487-88. But, the court withheld judgment on speakers who had "difficulty" speaking English because they could suffer "adverse effects," which would have been "improper" to rule on at the summary judgment stage. *Id*. at 1488; *see also Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980) (holding an English-only policy permissible when the employee was "fully bilingual" and allowed to speak Spanish "during work breaks").

In contrast, the Northern District of Texas in *E.E.O.C. v. Premier Operator Servs*. held that an English-only policy created a disparate impact when employees could not comply with the policy. 113 F.Supp.2d 1066, 1076 (N.D. Tex. 2000). Unlike Spun Steak, Premier – a telephone-operator service – expected its employees to converse with their Spanish-speaking clientele. *Id*. at 1068. Nevertheless, Premier's English-only policy forbade employees from speaking Spanish "at all [other] times." *Id*. at 1069. There was substantial evidence that the policy contained no exceptions and punished employees for unintentional slips. *Id*. at 1070. Ruling nearly a decade after Spun Steak, the court's opinion also relied on expert testimony discussing the uncontrollable nature of "code switching" after speaking a second language. *Id*. at 1069-71. Because of the absolute and punitive nature of the policy, coupled with the impossibility of compliance, the court found the policy denied employees a privilege of employment. *Id*. at 1075-76.

Far from Defendants' assertion that Plaintiff can readily comply, the record overwhelmingly demonstrates the Navajo employees' inability to comply with the

English-only policy.[1] Pierce Decl. ¶¶ 6, 10. For starters, four employees quit because they knew they could not comply with the policy. *Id*. ¶ 6. Further, one employee, who chose to work despite the strict policy, unsurprisingly still failed to comply and was punished. *Id*. ¶ 10. When four employees quit and one employee slips despite knowing the severe consequences, it is evident that it must be difficult to comply.

Extensive research, which was absent from both *Gloor* and *Spun Steak*, describes two factors that made it impossible for the employees to comply with the policy. *See Spun Steak*, 998 F.2d at 1487-88; *Gloor*, 618 F.2d at 267; *Premier*, 113 F.Supp.2d at 1069-71. First, research presented in *Premier* and by Dr. Diaz explains that bilingual employees will "unconsciously switch" between languages. 113 F.Supp.2d at 1070; *see also* Diaz Decl. ¶ 7. Here, the four terminated workers knew that they "inadvertently" spoke Navajo, which made it impossible for them to comply with the policy. Pierce Decl. ¶ 7. Second, the research emphasized that "[b]ilingual speakers will … continue to speak in the language in which they most recently spoke." Diaz Decl. ¶ 7; *see also* Premier, 113 F.Supp.2d at 1070. This conclusion was verified when Bill Redstone "slip[ped]" into Navajo when he tried to warn customers about the wet floor. Pierce Decl. ¶ 10. Because over fifty percent of the customers are Navajo, and since Redstone was working next to

[1] The Defendants improperly rely on several district court cases to suggest that courts support an "ability to comply" standard. Defendants' Motion for Partial Summary Judgment ("Defs' MSJ") 8. In these cases, because the plaintiffs *could* comply but chose not to, courts said they had an "ability" to comply. However, none of these cases address instances where the plaintiffs could *not* comply with a policy. *See Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1409 (9th Cir. 1987) (holding that a disc-jockey, who had broadcast only in English for years, could comply with an on-air, English-only policy); *Kania v. Archdiocese of Philadelphia*, 14 F.Supp.2d 730, 736 (E.D. Pa. 1998) ("Because she could have readily complied with the English-only rule, it did not cause [an] adverse impact."); *Long v. First Union Corp. of Virginia*, 894 F.Supp. 933, 941 (E.D. Va. 1995) ("[Bilingual] plaintiffs may speak to each other…at work [and] admit that they continued to speak Spanish…on the job."); *Gonzalez v. The Salvation Army,* Case No. 89–1679, 1991 WL 11009376 (M.D. Fla. 1991*), aff'd,* 985 F.2d 578 (11th Cir. 1993) (the opinion did not address a plaintiff's ability to comply with a policy).

them and expected to speak Navajo to them if they desired, it is possible Redstone had just been conversing with a customer in Navajo prior to his slip. *Id*. ¶ 8. Miller Decl. ¶¶ 5, 16. Therefore, it would have been impossible for Redstone to seamlessly switch back to English to provide the warning. Diaz Decl. ¶ 7. While it was "axiomatic" in *Spun Steak* that individuals could "elect" which language to speak, the research and experiences borne out by the Burger Stop employees has repeatedly shown the fallacy in this axiom. *See* 998 F.2d at 1487; *Premier*, 113 F.Supp.2d at 1070; Pierce Decl. ¶¶ 6, 7, 10.

The employees' inability to comply is accentuated by the Millers' punishments of minor slips. While employees were permitted to make minor slips in *Spun Steak*, the Navajo employees here, like in *Premier*, were not afforded this luxury. 998 F.2d at 1488; 113 F.Supp.2d at 1069; Miller Decl. ¶¶ 15, 16. For example, Redstone received a note in his file for his very minor slip. Miller Decl. ¶ 16. Defendants mischaracterize this incident as Redstone issuing a "safety warning that should have been in English." Defs' MSJ 9. But both parties agree that this warning actually arose as customers "approached" a recently mopped floor. Miller Decl. ¶ 16; Pierce Decl. ¶ 10. Thus, this was not a routine announcement like: "The restaurant is closing soon," but an instinctual warning, like: "Beware!" See Pierce Decl. ¶ 10. Further, as Pierce explained, "What takes us once to explain in Navajo can take two or three times as long as in English." *Id*. ¶ 6. There was no time for Redstone to translate his warning; he appropriately prioritized safety over translation. *See id*. ¶ 10. As Defendants admit, strict enforcement of an English-only policy poses a significant barrier to conversing. Defs' MSJ 9. Thus, despite Defendants' claims to the contrary, as the Millers strictly enforce their policy, they deny their employees a privilege of employment.

b. Burger Stop's English-only policy creates a hostile work environment because the policy acts as a "badge" singling-out Navajo-speakers and is enforced in a draconian manner while not permitting any exceptions.

English-only policies create hostile work environments when the policy itself stigmatizes a protected class and when the policy's effects are so "pervasive" as to create

a "discriminatory" environment. *Spun Steak*, 998 F.2d at 1489; *Maldonado*, 433 F.3d at 1304-05. Whether practices are "pervasive" requires examining the "totality of the circumstances." *Spun Steak*, 998 F.2d at 1489. A policy with few exceptions, enforced in a "draconian" manner is suggestive of a discriminatory policy. *Id*. at 1483, 1488, 1489.

The Ninth Circuit in *Spun Steak* did not find the English-only policy to be discriminatory because the plaintiffs only provided conclusory statements, while the policy included several exceptions and was not strictly enforced. *Id*. at 1483, 1489. Specifically, Spun Steak omitted one worker from the policy who did not speak English and permitted other bilingual speakers to continue speaking Spanish. *Id*. at 1483. The court specifically noted that Spun Steak was not punishing "minor slips," even though the court could "envision a case [where] such rules are enforced in … a draconian manner." *Id*. at 1488, 1489. The lack of evidence and specific factual elements prevented the Ninth Circuit from finding a hostile work environment. *Id*.

In contrast, the Tenth Circuit in *Maldonado* held that an English-only policy may create a hostile work environment. 433 F.3d at 1304-05. The City of Altus instituted an English-only policy in response to complaints about Spanish being spoken on city radios. *Id*. at 1298. The court reasoned that the policy itself could "be construed as an expression of hostility to Hispanics." *Id*. at 1305. Compelling all workers to speak a foreign language could be just as uncomfortable as requiring all employees to display a "badge" designating their religion. *Id*. This policy was coupled with substantial evidence of ethnic taunting, which led the Tenth Circuit to hold that a juror would "not be unreasonable in finding that a hostile work environment existed." *Id*. at 1301, 1306.

Similarly, the Northern District of Texas found sufficient evidence that Premier's enforcement of its policy created a hostile workplace. *Premier*, 113 F.Supp.2d at 1076. Premier strictly enforced their policy and punished those who disobeyed in a draconian manner. *Id*. at 1069. For example, Premier did not allow employees to speak Spanish during breaks and threatened employees for inadvertent slips. *Id*. Premier also fired employees who refused to sign onto the policy or simply "voiced opposition." *Id*. Further,

the non-Hispanic employees were "not subject to the same oppressive monitoring or potential discipline and discharge." *Id*. at 1075. With this thorough record, the court held that the English-only policy created a disparate impact. *Id*. at 1076.

Burger Stop's English-only policy creates a hostile work environment because it stigmatizes Navajo employees and is enforced in a discriminatory manner. Like the policy in *Maldonado*, Burger Stop's English-only policy only singles-out Navajo speakers. *See* 433 F.3d at 1305. On its own, this would likely resemble a "badge." *See id*. But Burger Stop's policy goes farther for two reasons. First, it reinforces Burger Stop's prior conduct, which included posting signs in the dining area, kitchen, and break room reading "Please, No Navajo." Miller Decl. ¶ 7. Second, the language exclusion is a specific reminder of the "cultural genocide" that was inflicted on the Navajo Nation. Diaz Decl. ¶ 5. To fight this "genocide" and preserve their culture and identity, the Navajo Nation has encouraged its members to speak in Navajo. *Id*. ¶ 6. Thus, the Millers' decision to post these signs before anyone complained, and in areas irrelevant to serving customers, suggests the owners have a strong disposition against Navajo speakers. Miller Decl. ¶¶ 7, 8. Nor can the Millers plead ignorance about this policy's message, when they have hired hundreds of Navajo employees and claim to have "good relations" with Navajo people. *Id*. ¶ 5. Thus, the specific exclusion of the Navajo language acts as an even crueler badge against the Navajo employees. *See id*.; *Maldonado*, 433 F.3d at 1305.

Beyond the stigma of this policy, there is substantial evidence that the policy was implemented in a "draconian" manner. First, four employees were terminated when they realized they could not comply with the policy. Pierce Decl. ¶ 7. Few things are more draconian than firing an employee. Only in *Premier* were employees, who could not comply, fired. *See* 113 F.Supp.2d at 1069. In stark contrast, in neither *Spun Steak, Jurado, Kania,* or *Long*, were any employees fired for not being able to comply; some were fired for refusing to comply, but this is a distinction Defendants overlook. *See* 998 F.2d at 1483; 813 F.2d at 1409; 14 F.Supp.2d at 736; 894 F.Supp. at 941. Second, an employee who tried to comply but failed was punished with a notation in his file, which

could cost him shift preferences. Pierce Decl. ¶ 10. Defendants admit he was "reprimanded," but discount how a loss of shift preferences can impact one's ability to retain this job. Defs' MSJ 9. Lastly, the written policy contained no exceptions, a luxury even Spun Steak afforded their employees. *See Spun Steak*, 998 F.2d at 1483; Pierce Decl. ¶ 7. Miller's supposed claim that he orally provided exceptions was never reflected in the policy itself. Miller Decl. ¶ 14. Thus, like *Premier*, the employees could seemingly never speak in Navajo on the premises. *Premier*, 113 F.Supp.2d at 1069, Pierce Decl. ¶¶ 7,10. Most alarmingly, even though the Millers did not permit any exceptions for the Navajo employees, they did permit exceptions for themselves. Miller Dep. 10:7-12. Sarah Miller and her son frequently spoke Polish in the restaurant, yet neither were ever penalized. *Id*. These examples mirror the blanket policy in *Premier*, highlight what the Ninth Circuit likely envisioned as a "draconian" policy, and coupled with the policy's double-standard application, provide ample evidence of a hostile work environment. *See id*.; *Spun Steak*, 998 F.2d at 1488; *Premier*, 113 F.Supp.2d at 1069.

In short, Burger Stop's English-only policy created a hostile work environment. By also denying the employees a privilege of employment, a reasonable juror would conclude that the English-only policy created a prima facie case of disparate impact.

2. The Defendants' English-only policy has no business necessity because it failed to improve the workplace environment, hinders customer service, and is unnecessary for employee supervision.

The second question in the disparate-impact analysis is whether the English-only policy has a "manifest relationship" to the employer's goals. *Griggs*, 401 U.S. at 432. The policy must serve the employer's goals "in a significant way." *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 659 (1989); *see also Gutierrez v. Mun. Ct. of Se. Jud. Dist., Los Angeles Cnty.*, 838 F.2d 1031, 1041-1042 (9th Cir. 1988)[2] ("The business

[2] This case was vacated as moot, 490 U.S. 1016 (1989), because the plaintiff no longer had standing, but it still represents the Ninth Circuit's clearest articulation of the business necessity test and analysis.

necessity … must be sufficiently compelling to override [a] discriminatory impact [and] must effectively carry out the business purpose it is alleged to serve"). While the policy does not need to be "essential or indispensable" to the employer, it must carry a greater than "insubstantial justification." *Atonio*, 490 U.S. at 659. The defendant carries the full burden of proof in proving business necessity. Pub.L. No. 102–166, 105 Stat. 1071; *see also Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1117 (11th Cir. 1993).

Burger Stop's English-only policy did not serve any of its business goals. It did not improve the workplace environment, customer service, or employee supervision.

a. Burger Stop's English-only policy is not necessary to improve the workplace environment because there is no evidence that the use of Navajo alienated workers or customers.

Courts have held that an English-only policy is permissible to improve the workplace environment when the policy can reduce exclusion and alienation caused by employees speaking a language their coworkers do not understand. *See Kania*, 14 F.Supp.2d at 736; *Long*, 894 F.Supp. at 941. The business must offer credible evidence of complaints "resulting from the use of languages other than English" to establish a business necessity. *Maldonado*, 433 F.3d at 1306; *Gutierrez*, 838 F.2d at 1042.

The Ninth Circuit in *Gutierrez* did not permit an English-only policy because the court could not find that Spanish was used to "belittle non-Spanish speaking employees." 838 F.2d at 1042. A courthouse instituted an English-only policy to promote racial harmony. *Id*. Since there was no evidence that Spanish was used to "conceal the substance" of any employees' conversations, and thus there was no exclusion, the Ninth Circuit found no business necessity justified the English-only policy. *Id*. at 1043; *see also Maldonado*, 433 F.3d at 1306-07 (finding "scant" evidence of "any communication problems" caused by Spanish-speakers which would justify an English-only policy).

Defendants fail to offer any evidence that anyone complained about the use of Navajo. Miller Decl. ¶¶ 9-10. Critically, Defendants overlook the distinction that while there were complaints which arose from Navajo conversations, the complaints were about

what was said, rather than the language it was said in. *Id*. ¶ 9. Here, as in *Gutierrez* and *Maldonado*, there was neither "conceal[ment]" nor "problems … resulting from the use of" Navajo. 838 F.2d at 1042; 433 F.3d at 1307. Thus, an English-only policy would not improve the workplace environment.

Because of this overlooked distinction, Defendants' reliance on *Long* and *Kania* is misplaced. 14 F.Supp.2d at 736; 894 F.Supp. at 941. The courts in *Long* and *Kania* only found English-only policies permissible because there was evidence that employees used Spanish to alienate and exclude others. 14 F.Supp.2d at 736; 894 F.Supp. at 941. For example, Defendants accurately cite *Long* where Spanish was used "to exclude and intimidate other employees who did not speak the language." Defs' MSJ 12. But Defendants fail to analogize this case to the present facts, where employees were complaining about the substance of what other employees were saying. *Id*.; Miller Decl. ¶ 9. Since no one at Burger Stop complained about not understanding the Navajo speakers, these cases are inapposite. Miller Decl. ¶ 9. For these reasons, Defendants fail to demonstrate how the English-only policy would improve the workplace.

b. Burger Stop's English-only policy will not improve, and will actually hinder, customer service.

An English-only policy is only justified to improve customer service when speaking English is a critical and articulated element of one's job. *See E.E.O.C. v. Sephora*, 419 F.Supp.2d 408, 417 (S.D.N.Y. 2005); *Pacheco v. N.Y. Presbyterian Hosp.*, 593 F.Supp. 2d 599, 621-622 (S.D.N.Y. 2009).

Defendants rely on two Southern District of New York cases to support their argument, but neither case controls or has similar facts to the case here. In *Sephora*, the Southern District of New York held that a limited English-only policy aligned with Sephora's focus on customer service. 419 F.Supp.2d at 417. Sephora required English on the retail floor to foster "politeness and approachability…because client service is the core of Sephora's business." *Id*. Similarly in *Pacheco*, the Southern District of New York held that an English-only policy aligned with a hospital's "guiding principle" of treating

patients with respect. 593 F.Supp.2d at 622. The plaintiff acknowledged that speaking English was necessary to demonstrate respect so that patients would not feel "ridiculed … by the use of Spanish." *Id*. at 614, 622. In short, the hospital's goal of respect, and Sephora's goal of approachability were both clearly connected to the English-only policy. *See id*. at 622; *Sephora*, 419 F.Supp.2d at 417.

In contrast, neither of Burger Stop's supposed goals are connected to the English-only policy. First, Defendants claim that Miller's goal is "ensuring that customers are treated with respect." Defs' MSJ 14. Unlike *Pacheco*, where speaking English protected customers from feeling "ridiculed," customers at Burger Stop never complained or felt ridiculed by the employees' *use* of Navajo. *Id*.; 593 F.Supp.2d at 614. Miller had a second supposed objective: "[W]e prioritize…making good food quickly [and] [a]ccura[ately]." Miller Dep. 12:20-22. Whereas "client service" was the core of Sephora's business, here, Burger Stop's core objective is efficient food service. *See id*.; Miller Dep. 12:20-22. So, while Sephora expected its employees to speak English to foster "politeness and approachability," Burger Stop never connected, nor could connect, a requirement to speak English with serving tasty food quickly. *See Sephora*, 419 F.Supp.2d at 416, Miller Decl. ¶ 7. The obvious irony with this policy is that since the employees speak more quickly and accurately in Navajo, forcing them to speak English not only fails to improve customer service, but likely slows down service and creates more inaccurate orders. Pierce Decl. ¶ 6. Thus, unlike *Sephora* and *Pacheco* where there was an evident relationship between a policy and the goals, here, the goals and the policy are completely disconnected. *See* 419 F.Supp.2d at 416; 593 F.Supp.2d at 621-22.

c. Burger Stop's English-only policy is unnecessary to improve employee supervision as all the supervisors speak Navajo, while the Millers are rarely in the restaurant.

An English-only policy may be permitted if it enables a manager to supervise their employees. *Gonzalez*, 1991 WL 11009376, at *3.

The Ninth Circuit in *Gutierrez* held that an English-only policy was an "illogical" and "unpersuasive" method to supervise bilingual employees. 838 F.2d at 1043. The employer argued that the policy was necessary to supervise employees, even though the employees were hired, in part, as translators. *Id*. Not only was the Ninth Circuit befuddled by the employer's logic, but the court aptly suggested that the employer could have simply hired bilingual supervisors. *Id*. Because of the disconnect between the employees hired purpose and the English-only policy, the Ninth Circuit found that supervision did not justify a business necessity. *Id*.

Here, the Navajo employees were also hired, in part, because of their ability to speak in Navajo with Navajo customers. Pierce Decl. ¶ 8. Thus, just like in *Gutierrez*, enacting an English-only policy makes little sense. 838 F.2d at 1043. Further, as the Ninth Circuit suggested, all of Burger Stop's supervisors *do* speak Navajo, so they already effectively supervise the Navajo employees. Miller Dep. 9:18-24; *see Gutierrez*, 838 F.2d at 1043. Thus, the English-only policy here is even more "illogical" than it was in *Gutierrez*. *See id*.; 838 F.2d at 1043.

Defendants' reliance on *Gonzalez* does not bolster their case. *See* 1991 WL 11009376, at *2. In *Gonzalez*, the Middle District of Florida permitted an English-only policy when the director was the primary supervisor and needed to "monitor" employee conversations. *Id*. at *3. The Millers, on the other hand, are not the primary supervisors. Miller Dep. 9:10-24. In fact, Sean Miller is only in the restaurant on weekdays during the lunch shift, while his son, Brett, only covers the lunch and dinner shifts on weekends. *Id*. Sensibly, the Millers employ bilingual shift supervisors during all business hours who speak Navajo and can report back to the Millers. *Id*. Thus, the Defendants' claim that the Millers "need to know what is being said in the workplace" is incomparable to the director's claim in *Gonzalez*. Defs' MSJ 5; 1991 WL 11009376, at *3.

A reasonable juror would not find any sensible business justification for Burger Stop's English-only policy; therefore, summary judgment is inappropriate.

3. Plaintiff offers three less discriminatory alternatives, all of which would have achieved better results than Burger Stop's English-only policy.

Even if an employer demonstrates the business necessity of a policy, the plaintiff still retains the opportunity to offer less discriminatory alternatives that "satisfy the employer's … needs." *Contreras v. City of Los Angeles*., 656 F.2d 1267, 1285 (9th Cir. 1981).

In *Fitzpatrick*, the Eleventh Circuit did not find that the plaintiffs' alternatives satisfied the City of Atlanta's safety requirements. 2 F.3d at 1122. Several firefighters, who for medical reasons could not shave, sued the city over its no-facial hair for firefighters requirement. *Id*. at 1114. While the city presented "credible evidence" that "safety concerns" necessitated their policy, the firefighters were unable to "come forward with any evidence" to establish how their alternatives would meet the City's safety needs. *Id.* at 1122. Therefore, the Eleventh Circuit held that the plaintiffs' alternatives were insufficient. *Id*.

In contrast to *Fitzpatrick*, Plaintiff offers several alternatives to the English-only policy that would certainly meet the Defendants' needs. *See id*. First, Pierce suggested to the Millers that they "ban[] all offensive speech." Pierce Decl. ¶ 8. This directly addressed the core of the problem – the two offending employees – yet the Millers ignored this option. Miller Decl. 12:2-4. Second, Miller could have fired the offending employees, since the complaints began when the two employees started "making sexually suggestive comments." Tsosie Decl. ¶ 4. Lastly, and most obviously, once Miller reprimanded the employees, the problems seemed to stop; in fact, the workplace was "fine after that." Hunt Dep. 3:23-25. Unlike the alternatives in *Fitzpatrick*, these solutions match the Millers' desire to stop the harmful conduct and make much more sense than blanketing the entire workforce with a strict English-only policy. *See Fitzpatrick,* 2 F.3d at 1122. Despite these less discriminatory alternatives, Defendants still pursued their discriminatory policy.

Defendants' attempted rebuttals are unsound. First, Defendants assert that banning all offensive speech would not work because the Millers need to supervise their employees. Defs' MSJ 16-17. But, since the Millers are rarely in the restaurant and employ Navajo supervisors, they do not – in practice – supervise their employees. *See* Miller Dep. 9:8-24. Next, Defendants argue that "hiring bilingual supervisors is not a viable solution," even though Miller also admits that Burger Stop's supervisors are "all" bilingual and "great." *Id*.; Defs' MSJ 17. If they are so "great," they must be at least somewhat "viable." Because Plaintiff offers several alternatives, which Defendants fail to reasonably counter, Plaintiff has offered sufficient evidence to defeat Defendants' motion for summary judgment.

IV. CONCLUSION

The Millers' attempt to shroud their English-only policy in a veneer of business necessity has been de-robed. When the Millers learned of offensive behavior by Navajo speakers, they jumped at the chance to formalize their no-Navajo ambitions. But their ploy was never about protecting their business, customers, or employees – there is no evidence anyone complained about the use of Navajo and the policy did not improve any of their business operations. The Millers' ambitions rested solely on their discriminatory desire to deny Navajo speakers the freedom to speak their ancestral language. They tried once with a sign, but to no avail, so they did their research. They found the EEOC website, learned that they needed a "business necessity," and fabricated one. In response to legitimate complaints, the Millers chose an overbearing and discriminatory policy instead of reasonable alternatives. For these reasons, this Court must deny Defendants' summary judgment motion.

DATED: December 5, 2022

BY: _____
Attorney for Plaintiff Equal Employment Opportunity Council

Applicant Details

First Name	**Natalie**
Middle Initial	**R**
Last Name	**Cohn-Aronoff**
Citizenship Status	**U. S. Citizen**
Email Address	**cohnaronoff@uchicago.edu**
Address	**Address** Street **5454 S. Shore Drive** City **Chicago** State/Territory **Illinois** Zip **60615** Country **United States**
Contact Phone Number	**650-740-9109**

Applicant Education

BA/BS From	**University of Southern California**
Date of BA/BS	**May 2020**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The University of Chicago Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Huq, Aziz
huq@uchicago.edu
773-702-9566
Doerfler, Ryan
doerfler@uchicago.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Natalie Cohn-Aronoff
5454 South Shore Drive, Apartment 321
Chicago, IL 60615
650-740-9109

June 12, 2023

The Honorable Juan R. Sánchez
U.S. District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106

Dear Chief Judge Sánchez:

I am a rising third-year law student at the University of Chicago Law School and I am applying for a clerkship in your chambers for the 2024 term. I am certain a clerkship in your chambers would provide both practical experience and insight into judicial analysis that will be formative to a career in civil rights and public interest work. Additionally, my hometown is near Philadelphia and I would welcome the opportunity to return to the area after law school.

As an intern for a U.S. Attorney's Office and as a member of the Civil Rights and Police Accountability Project within the Mandel Legal Aid Clinic, I have gained strong research and writing skills on a wide range of legal issues. For those experiences, I have written memoranda on issues such as potential civil rights investigations, the impact of since-decriminalized drug convictions on sentencing, and the physical boundaries of a permissible search of a location described in a warrant. I have also contributed to research and reports on police use-of-force training and police presence in trauma centers as a healthcare privacy issue. These experiences have strengthened my ability to write nuanced legal and factual analysis clearly, succinctly, and under tight deadlines. I have also developed my statutory interpretation abilities as a member of *The University of Chicago Law Review*, for which I wrote a Comment that required close textual analysis of a federal statute. This summer, I am continuing to gain practical writing experience as a summer associate at the litigation firm Quinn Emanuel Urquhart & Sullivan, for which I am currently writing a memorandum on navigating data privacy issues, drafting a motion in a film industry contract dispute, and performing legal research for a variety of other cases. I will acquire additional experience later this summer at the California Women's Law Center.

My resume, transcript, and writing sample are attached for your review. Please let me know if there is any other information I can provide, and thank you so much for your consideration.

Sincerely,

Natalie Cohn-Aronoff

Natalie Cohn-Aronoff

NATALIE COHN-ARONOFF

cohnaronoff@uchicago.edu | 650-740-9109
5454 S. Shore Drive, Apt. 321 Chicago, IL 60615

EDUCATION

THE UNIVERSITY OF CHICAGO LAW SCHOOL, Chicago, IL
J.D. candidate, June 2024
Honors: Dean's Award, Constitutional Law III: Equal Protection and Substantive Due Process (highest grade in section)
Activities: The University of Chicago Law Review, Online Editor
If/When/How: Lawyering for Reproductive Justice, Vice President
Jewish Law Students Association, Vice President
Entertainment and Sports Law Society, Vice President of Entertainment
Law School Musical, Senior Writer
American Constitution Society, Member

UNIVERSITY OF SOUTHERN CALIFORNIA, Los Angeles, CA
B.F.A., *summa cum laude*, Writing for Screen and Television, May 2020
Minor in Law and Public Policy
Honors: Renaissance Scholar (distinction for academic achievement in disparate fields of study)
Phi Kappa Phi
Thematic Option Honors College
Academic Achievement Awards (merit scholarships)
Study Abroad: University of Burgundy, Dijon, France, Summer 2018
Activities: Women of Cinematic Arts, Co-President (currently sit on the Membership Committee of the alumni board)
Women's Ice Hockey, Player
Trojan Debate Squad, Member

EXPERIENCE

CALIFORNIA WOMEN'S LAW CENTER, El Segundo, CA — Summer 2023
Summer Legal Intern

QUINN EMANUEL URQUHART & SULLIVAN, Los Angeles, CA — Summer 2023
Summer Associate

APPLE TV+, Los Angeles, CA (remote) — Mar. 2023–Present
Reader

- Summarize, analyze, and offer constructive comments on books and screenplays for potential production.

CIVIL RIGHTS AND POLICE ACCOUNTABILITY PROJECT, Chicago, IL — Sept. 2022–May 2023
Clinical Student

- Contributed to a report on Chicago Police Department training on use of force and presented findings.
- Analyzed reports and researched several areas of law related to police practice in connection with a federal consent decree.
- Conducted research, including interviews, on police presence in trauma centers as part of a medical-legal partnership.

UNITED STATES ATTORNEY'S OFFICE, Newark, NJ — May 2022–July 2022
Summer Legal Intern

- Researched legal avenues to pursue a potential civil rights investigation and discussed findings in a memorandum.
- Conducted legal research on a criminal procedure issue and wrote a response to a motion to suppress evidence.
- Assisted AUSAs with trial preparation for a variety of cases and prepared factual basis questions for a guilty plea.
- Underwent skill development trainings, including in legal writing and oral advocacy, attended trials and meetings alongside AUSAs, and participated in a mock trial as defense counsel.

SUGAR23, Los Angeles, CA (remote) — May 2020–Mar. 2023
Reader

- Summarized, analyzed, and offered constructive comments on books and screenplays for potential production or representation.

MOSAIC MEDIA GROUP, Beverly Hills, CA — Jan. 2020–May 2020
Management Intern

- Covered manager desks and front desk reception: rolled calls, managed emails and guests, and tracked casting updates.
- Read, summarized, and analyzed teleplays and submitted clients for roles.

VERVE TALENT AND LITERARY AGENCY, Los Angeles, CA — Aug. 2020–Dec. 2020
Mailroom Intern

- Front desk reception: transferred calls and interacted with high-profile guests.
- Researched and prepared informational documents on potential clients for agents before meetings.
- Wrote summaries and comments on screenplay submissions.

SKILLS AND INTERESTS

Enjoy comedy writing, ice hockey, podcasts, indie rock music, and Old Hollywood movies.

LAW SCHOOL TRANSCRIPT

Natalie Cohn-Aronoff
cohnaronoff@uchicago.edu | 650-740-9109
5454 S. Shore Drive, Apt. 321 Chicago, IL 60615

Enclosed, please find a current version of my transcript, as well as a key to the University of Chicago's grading system.

At the University of Chicago Law School, only grades for classes with final exams are released at the end of the quarter. Grades for clinics are assigned at the conclusion of a student's participation in the clinic.

Classes for which grades are based upon a final paper also run on a different schedule. Final papers are typically due at the end of the subsequent quarter, and grades are released sometime after that. Reproductive Health and Justice, Advanced First Amendment Law, and Constitutional Law V: Freedom of Religion are classes with final papers.

I am happy to provide an updated transcript as soon as one becomes available.

THE UNIVERSITY OF CHICAGO

Name: Natalie Cohn-Aronoff
Student ID: 12116825

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Current Status: Active in Program
J.D. in Law

External Education

University of Southern California
Los Angeles, California
Bachelor of Fine Arts 2020

Beginning of Law School Record

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law Lior Strahilevitz	3	3	180
LAWS	30211	Civil Procedure Emily Buss	4	4	177
LAWS	30611	Torts Adam Chilton	4	4	181
LAWS	30711	Legal Research and Writing Alison Gocke	1	1	178

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law Jonathan Masur	4	4	179
LAWS	30411	Property Aziz Huq	4	4	179
LAWS	30511	Contracts Douglas Baird	4	4	177
LAWS	30711	Legal Research and Writing Alison Gocke	1	1	178

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Alison Gocke	2	2	178
LAWS	30713	Transactional Lawyering Joan Neal	3	3	177
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process Aziz Huq	3	3	184
LAWS	43273	Emotions, Reason, and Law Martha C Nussbaum	3	3	176
LAWS	44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	182

Honors/Awards
The Dean's Award, for best exam in a section of Constitutional Law III by a first-year student

Summer 2022

Honors/Awards
The University of Chicago Law Review, Staff Member 2022-23

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	41601	Evidence Geoffrey Stone	3	3	179
LAWS	45801	Copyright Randal Picker	3	3	178
LAWS	53263	Art Law William M Landes Anthony Hirschel	3	3	181
LAWS	90913	Civil Rights Clinic: Police Accountability Craig Futterman	1	0	
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	40201	Constitutional Law II: Freedom of Speech Genevieve Lakier	3	3	180
LAWS	42801	Antitrust Law Randal Picker	3	3	181
LAWS	47201	Criminal Procedure I: The Investigative Process Sharon Fairley	3	3	178
LAWS	53131	Reproductive Health and Justice Emily Werth	3	0	
LAWS	90913	Civil Rights Clinic: Police Accountability Craig Futterman	1	0	
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Date Issued: 05/31/2023

THE UNIVERSITY OF CHICAGO

Name: Natalie Cohn-Aronoff
Student ID: 12116825

University of Chicago Law School

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	40501	Constitutional Law V: Freedom of Religion Mary Anne Case	3	0	
LAWS	43253	Regulation of Banks and Financial Institutions Adriana Robertson	3	3	177
LAWS	47101	Constitutional Law VII: Parent, Child, and State Emily Buss	3	3	180
LAWS	53469	Advanced First Amendment Law Genevieve Lakier	3	0	
LAWS	90913	Civil Rights Clinic: Police Accountability Craig Futterman	1	0	
LAWS	94110	The University of Chicago Law Review	1	1	P
Req Designation:		Meets Substantial Research Paper Requirement Anthony Casey			

End of University of Chicago Law School


THE UNIVERSITY OF
CHICAGO

Professor Aziz Huq
Frank and Bernice J. Greenberg Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
huq@uchicago.edu | 773-702-9566

May 31, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to recommend Natalie Cohn-Aronoff (University of Chicago Class of 2024), as a law clerk in your chambers. In the academic year 2021-22, I taught Natalie in two 1L courses —Property and Constitutional Law (Equality and Due Process). Natalie did exceedingly well in the latter constitutional law class, and achieved a very commendable performance in the first, common-law class. I walked away from my interactions during class and from my reading of Natalie's exams with a very positive view of her lawyerly intellect. The balance of her transcript to date confirms my positive impressions of Natalie's intellectual skills: It is consistently strong. And it is no surprise to me that she was selected for the prestigious University of Chicago Law Review. In summary, my interactions with her over the course of the academic year suggest to me that she will be a polished, professional, and highly effective (at an interpersonal level) clerk in chambers. Accordingly, I am very pleased to offer a very enthusiastic recommendation on her behalf.

Let me begin with academics: Natalie is a strong student who has consistently secured very good grades, ranging from As to high Bs, across a diverse pool of demanding courses. In my constitutional law class—where the grade was based exclusively on a take-home exam—she wrote an exceptional set of answers that carefully and comprehensively addressed all of the issues presented by a fact pattern (a prerequisite to scoring well). Indeed, she secured (by a clear margin) the best grade in the class. I tend to write issue-intensive, complex hypotheticals that must be grasped and navigated in relatively narrow time frames. In Constitutional Law III, Natalie's exam was a masterwork of careful and lucid reasoning. She was able to aggregate information within the prompt, parse the nuance of legal questions (sorting the wheat of hard problems from the chaff of irrelevant detail), and then provide pellucid and fair-minded consideration of both sides of the argument. The exam, notwithstanding the pressure-cooker conditions of its production, was also an impressive feat of writing. I enjoyed reading the exam—which, in context, is quite the rare treat. Natalie's other exam, which was in my Property class, was not quite as strong. But if it fell a bit short of her magnificent Constitutional Law III performance, this should not be taken to suggest that it was an embarrassment. To the contrary, looking back at that exam, I think it was an entirely creditable effort.

I can support my very positive view of Natalie's intellectual and lawyering skills with other sources of information. First, I had several conversations with Natalie, including during a couple of group lunches with students, in which she impressed me with her intellectual range and her knowledge of the world. She has a wide-ranging mind, and continues to pay attention to—and engage with—the world. Second, the balance of her transcript confirms my impressions of her skill and lawyerly savvy. The balance of her grades suggest that my evaluation is not an outlier. In the 1L year, Natalie scored extremely well in some classes (especially Torts and our foundational course Elements of the Law). Even when she did not perform quite as well, her grades place him in the stronger tier of her class, albeit not at the very top of the section. On the basis of all of this information, in short I am confident that Natalie would be more than capable of handling the intellectual work of a clerkship, and also that her writing is sufficiently clear and compelling that I would have no concerns about delegating to him on this front.

I should add a word here about Chicago's unusual grading system, and the way in which it enables precise comparisons between our students—but disadvantages them in comparison to students at peer schools. As you may well know, Chicago uses a very strict curve round a median score of 177 (which is a B in our argot). There is rarely any large movement from the median, and any grade above 180 is a rare and admirable one, awarded only to a small slice of any given class. Chicago also grades on a normal distribution, lending additional clarity and focus to its scores. Moreover, because it is on the quarter system, it is possible to be very precise about where a student falls in a class as a whole. We are hence able to very finely distinguish between students at all levels. Given all context, it is worth underscoring that Natalie is a very strong student. She would be picked out as excellent by a more coarse grading system (of the kind used at comparator schools), but the Chicago system allows a very precise evaluation of her areas of strength and relative weakness.

Natalie has achieved this impressive academic record even though she has been working part time through law school. More specifically, she works for a Los-Angeles-based production company reading a novel a week and writing reports on whether the latter could be effectively adapted for film or television. That Natalie has been able to balance this time commitment with her law schoolwork (and in 1L year too!), of course, reflects her time-management skills and more general composure and organizational skills. In addition, Natalie continues to create her own written fiction, often drawing on specific historical themes and incidents. Hence, she has a range of talents and interests broader than that of the modal law student. I think this will make her a very good fit in many judges' chambers—someone who is pleasant to have around, who strengthens the chambers in many different ways,

and who has broad and engaged cultural interests.

In the medium term, I understand that Natalie wants to be a litigator. She has already demonstrated an interest not just in litigation, but in public service. In her first summer of law school, she worked for the civil rights unit in the New Jersey U.S. Attorney's office. She has also been a very strong participant, I understand, in the law school's own police accountability clinic. At the same time, she continues to take advantage of Chicago's distinctively broad and interdisciplinary approach to the law without losing sight of the need to master the doctrine—not just by writing a comment for the Law Review, but also by continuing to take doctrinal classes.

Based on all this evidence, I anticipate that Natalie will perform very well in the demanding circumstances of a federal clerkship. I am very happy to offer my unqualified support for her application. Of course, I would be more than happy to answer any questions you have, and can be reached at your disposal at huq@uchicago.edu (and 703 702 9566).

Kind regards,

Aziz Huq

Ryan D. Doerfler
Professor of Law
Harvard Law School
1585 Massachusetts Ave • Cambridge, MA 02138 • P: 617-496-4919 • rdoerfler@law.harvard.edu

June 05, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Natalie Cohn-Aronoff for a clerkship in your chambers. Natalie was my student as a 1L in Legislation & Statutory Interpretation at the University of Chicago. Legislation & Statutory Interpretation is a lecture course that is part of the mandatory 1L curriculum. Natalie's exam was among the top handful in her section. That outcome was unsurprising, as Natalie had demonstrated careful reading and comprehension of cases throughout the term along with strong analytical reasoning skills. In a course that dealt primarily with complex problems of statutory interpretation, Natalie toggled easily between the specifics of the problem presented and the more general themes and patterns of argumentation that emerged over the quarter. Those skills were equally evident in Natalie's written exam, which assessed possible student loan actions by the executive under a variety of federal statutes. Natalie's analysis of that problem was careful and systematic, identifying an array of grounds upon which the various policies considered, ranging from a continuing pause on payments to outright cancellation, might be challenged and articulated a range of plausible responses, while at the same time acknowledging the difficulties of the government's position (in the exam, students were asked to write from the perspective of a Department of Justice attorney preparing an objective memo on the matter). Based purely on that performance, I would have great confidence in her ability to prepare top quality bench memoranda and draft opinions.

That confidence is bolstered by Natalie's law review comment, which considers whether the Freedom of Access to Clinic Entrances Act ("FACE") Act might provide protections for individuals seeking access to reproductive healthcare in a post-Dobbs world. Though implemented in response to threatening protests in the immediate vicinity of abortion clinics, Natalie explores the possibility of a more expansive reading of the statute, covering, for example, the use of "WANTED" posters by civilian enforcers of Texas's restrictive abortion law, S.B. 8. While self-consciously exploring more creative or ambitious interpretations of the statute, Natalie's analysis of the FACE Act is careful and sober. She very plausibly identifies the textual basis for these more expansive readings, but also acknowledges their limited scope, and closes with suggestions to Congress to clarify the law in ways that would make those readings less vulnerable to legal objection. All told, Natalie's analysis of the FACE Act is creative while also systematic and honest. Natalie's writing is also clear and concise, making her argument transparent and easy to process. To my mind, these are precisely the virtues of excellent legal writing.

Beyond her narrowly academic performance, I should also mention Natalie's impressive maturity. Throughout the quarter, I came to rely upon Natalie in offering a calm, serious voice in class discussion. Similarly, my conversations with Natalie after and outside of class were always friendly but focused. Even on topics that obviously concerned her normatively, Natalie was always clear-headed and grounded in discussion. (Again, I think this comes through clearly in her law review comment.)

As I hope the above makes obvious, I recommend Natalie highly and without reservation. Natalie would make an excellent law clerk, and any judicial chambers would be lucky to have her. Please feel free to contact me by phone or email if there is any additional information that I can provide.

Best regards,

Ryan D. Doerfler

WRITING SAMPLE

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I wrote the attached and excerpted research paper, *Saving FACE: A Reconsideration of the FACE Act*, as part of my commitments as a staffer on *The University of Chicago Law Review*. This draft incorporates feedback I received from my faculty advisor and my editors primarily during the paper proposal and outlining process. I also received comments on a first draft, mainly regarding structure and further development of sections not included in this sample.

This paper reexamines the FACE Act, a federal statutory protection of abortion access, in light of the constitutional right to an abortion being overturned. The excerpted portion of the paper is preceded by a brief history of a surge in deadly antiabortion violence during the 1990s that led to the FACE Act's enactment. This is followed by a discussion of the current landscape of abortion access, in which a current wave of state laws restricting abortion invites various tactics of abortion interference by private actors. The following excerpt is a statutory analysis of the FACE Act in an effort to untangle the law's potential limits followed by an application of the proposed interpretation to novel strategies by private actors to impede abortion access. Subsequent sections not included in this excerpt discuss potential challenges to the proposed interpretation and propose statutory amendments that would improve the FACE Act's utility given modern technology and the availability of reproductive healthcare beyond brick-and-mortar clinics.

II. THE FACE ACT'S PROTECTIONS AND PRINCIPLES

In the background of FACE's development was a period of antiabortion violence. Bombings, arson, and kidnappings occurred through the 1980s.[1] However, FACE was first conceived in response to a Supreme Court decision that made it more difficult for abortion providers to turn to courts for protection. In 1990, the Fourth Circuit upheld an injunction preventing Operation Rescue and associated antiabortion groups from blocking access to a Virginia abortion clinic under a section of the Ku Klux Klan Act that creates a right of action against conspiracies to deprive individuals of equal protection, finding that the attempt to prevent women from accessing a clinic constituted such a conspiracy.[2] The Supreme Court reversed in Bray v. Alexandria Women's Health Clinic,[3] disputing the notion that the conspiracy was gender-based or distinguished between interstate and intrastate patients. Bray denied abortion providers and patients access to federal injunctive relief, which they had been employing against repeat offenders. Some antiabortion activists "saw Bray as a license to escalate their efforts."[4] As a result of Bray, Representative Chuck Schumer of New York and Senator Ted Kennedy of Massachusetts swiftly began working on legislation to override the decision.[5] The murder of Dr. Gunn gave the passage of FACE more urgency, and the bill passed with bipartisan support in November 1993.[6] President Clinton signed FACE into law in May 1994.[7]

A. Overview of the FACE Act

FACE prohibits three types of activity: "force," "threat of force," and "physical obstruction," with the intent to "interfere with" or "intimidate" a person from "obtaining or providing reproductive health services."[8] The intent requirement can be inferred from a variety of evidence, including "leaflets, pamphlets," "signs," video, photos, "comments posted on social media," "prior interactions with a defendant, and even a defendant's bumper stickers."[9] However, FACE violations are often committed by antiabortion activists who readily admit intent, rendering the production of such evidence unnecessary.[10]

FACE provides several statutory definitions of key terms. "Physical obstruction," per the statute, "render[s] impassable ingress to or egress from" a reproductive health provider, or "render[s] passage to or from such a facility…unreasonably difficult or hazardous."[11] To "interfere with" is "to restrict a person's freedom of movement,"[12] and to "intimidate" is "to place a person in reasonable

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[1] Evelyn Figueroa & Mette Kurth, Madsen and the Face Act: Abortion Rights or Traffic Control?, 5 UCLA WOMEN'S L.J. 247, 247–48 (1994).

[2] Linda Greenhouse, Supreme Court Says Klan Law Can't Bar Abortion Blockades, N.Y. TIMES, Jan. 14, 1993, https://perma.cc/4FLF-8TLH.

[3] 506 U.S. 263, 264 (1993).

[4] Figueroa & Kurth, supra note 1, at 248.

[5] Linda Greenhouse, Supreme Court Says Klan Law Can't Bar Abortion Blockades, N.Y. TIMES, Jan. 14, 1993, https://perma.cc/4FLF-8TLH.

[6] Kevin Merida, House Approves Bill to Combat Violence at Abortion Clinics, WASH. POST, Nov. 19, 1993, https://perma.cc/6XWJ-9LJU; Roll Call Vote on Passage of the Bill S. 636, 103rd Cong. (1993).

[7] Abortion Clinic Access Bill Signing, C-SPAN. 8:01. May 26, 1994.

[8] 18 U.S.C. § 248(a)(1).

[9] Sanjay Patel, FACE Off with Anti-Abortion Extremism - Criminal Enforcement of 18 U.S.C. § 248 (FACE Act), 70 DEPT. J. FED. L. & PRAC. 277, 281 (2022).

[10] Id.

[11] 18 U.S.C. § 248(e)(4).

[12] 18 U.S.C. § 248(e)(2).

apprehension of bodily harm."[13] FACE protects "reproductive health services,"[14] including both abortion providers and antiabortion pregnancy centers, as well as "religious worship" institutions.[15]

FACE creates both criminal[16] and civil[17] causes of action. The Department of Justice prosecutes criminal FACE Act cases, but civil cases may also be brought by "private persons involved in providing or obtaining reproductive healthcare services" as well as state attorneys general.[18] Enforcement of FACE has varied; the statute fell into obscurity under the Bush administration, during which criminal enforcement of FACE declined by over 75%,[19] likely due to the administration's association with and support for the antiabortion movement.[20]

The statute creates different criminal penalties, which vary according to the number of offenses and if injury or death occurs.[21] For first offenses, an offender may receive either jail time or a fine; for subsequent offenses, penalties are steeper and both may imposed. Private plaintiffs in civil cases may seek injunctive relief or statutory damages.[22]

FACE has "repeatedly survived"[23] constitutional challenges in every circuit that has considered it. Circuit courts have, however, reached this conclusion in different ways. Most have held that because abortion clinics have "a number of patients and staff who do not reside" in the state in which they practice, those individuals "engage in interstate commerce when they obtain or provide reproductive-health services" and therefore fall within Congress' Commerce Clause purview.[24] Other circuits have found an interest in preserving "the availability of abortions nationwide" as the source of Congress' authority to regulate.[25]

B. Textual Analysis

Actionable conduct under FACE must be either "force," a "threat," or "physical obstruction," so it is imperative to define these terms. A substantial body of law defines "force" and "threat," while "physical obstruction" is more nebulous and can apply to a broader category of interference.

1. "Force" and "threat of force."

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[13] 18 U.S.C. § 248(e)(3).

[14] 18 U.S.C. § 248(e)(5).

[15] 18 U.S.C. § 248(a)(2).

[16] 18 U.S.C. § 248(b).

[17] 18 U.S.C. § 248(c).

[18] Patel, supra note 9, at 281.

[19] Daphne Eviatar, Abortion clinic violence prosecution cratered under Bush Administration, COL. INDEP., June 12, 2009, https://perma.cc/49S8-UNY5.

[20] Michelle Goldberg, How George Bush will ban abortion, SALON, Nov. 13, 2003, https://perma.cc/GK6M-2KE3.

[21] 18 U.S.C. § 248(b).

[22] 18 U.S.C. § 248(c)(1)(B).

[23] Neelam Patel, Emma Dozier, Isabella Oishi, & Ellie Persellin, Abortion Protesting, 23 GEO. J. GENDER & L. 121, 123 (2022).

[24] United States v. Dinwiddie, 76 F.3d 913, 919 (8th Cir. 1996). See also United States v. Gregg, 226 F.3d 253, 261 (3d Cir. 2000); United States v. Weslin, 156 F.3d 292, 296 (2d Cir. 1998); Hoffman v. Hunt, 126 F.3d 575, 583 (4th Cir. 1997).

[25] Terry v. Reno, 101 F.3d 1412, 1417 (D.C. Cir. 1996) (emphasis omitted); see also United States v. Wilson, 73 F.3d 675, 682 (7th Cir. 1995) (finding that a "substantial threat to the national reproductive health services market… distinguishes Congress's authority to regulate").

While 18 U.S.C. § 248(e) provides statutory definitions of many FACE Act terms, "threat of force" is not one of them, nor is "force" by itself. The term "force" is a legal term of art and can carry different meanings in different statutes.[26]

Under FACE, "the term 'force' is not limited to intentional acts that result in bodily injury."[27] The term is malleable, requiring no specific minimal amount of actual damage or harm inflicted. In other words, force under FACE is not necessarily "violent or assaultive force."[28] This fits in with the common law understanding of the term, in which "[m]inor uses of force may not constitute violence"[29] as violence is ordinarily understood.

While the Supreme Court has not interpreted FACE, a body of cases elucidates the general requirements of a "threat." Per one definition, a threat is "[p]ower, violence, or pressure directed against a person or thing."[30] As a carve-out of unprotected speech, threats must be construed so as to meet First Amendment requirements. Therefore, the Supreme Court has ruled that a threat must be more than "mere advocacy" of violence that does not rise to the level of "incitement,"[31] especially if it is general rather than directed towards a particular individual or group. Context and "the reaction of listeners" can distinguish a threat from constitutionally-protected speech; for instance, the Supreme Court found that a joking remark at a rally insinuating a desire to kill the president was "political hyperbole" and not a "true 'threat.'"[32] In its most recent "true threat" decision, the Court held that in the criminal context, it is insufficient merely that a reasonable person would view a statement as a threat, and intent to convey a threat was required.[33] The defendant had posted rap lyrics to Facebook that depicted "violent material about his soon-to-be ex-wife."[34] The Supreme Court has indicated it may extend that position by accepting a certiorari petition from a defendant challenging his stalking conviction on First Amendment grounds.[35] Were specific intent a required showing for a broader category of threats, more evidence would be necessary to demonstrate that statements or behavior conveyed a threat. Circuits that have considered what constitutes a "threat" have coalesced around an intent-centric definition.[36] However, most of these circuits have not analyzed the meaning of these terms within the meaning of the FACE Act specifically.

Because few circuit courts have meaningfully interpreted "force" or "threat of force" under FACE, United States v. Dinwiddie[37] has been highly influential. In that Eighth Circuit case, Regina Dinwiddie told an abortion provider, "remember Dr. Gunn…This could happen to you…He is not in the world anymore…Whoever sheds man's blood, by man his blood shall be shed."[38] The court, first considering FACE's constitutionality, referred to "force" and "threat of force" as "readily understandable terms that are used in everyday speech."[39] Analogizing to a fair housing statute that

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[26] See, e.g., Johnson v. United States, 559 U.S. 133, 139 (2010).

[27] Patel, supra note 9, at 282 (citing New York ex rel. Spitzer v. Cain, 418 F.Supp.2d 457, 473 (S.D.N.Y. 2006)).

[28] Cain, 418 F.Supp.2d at 473 (internal quotation marks omitted).

[29] United States v. Castleman, 572 U.S. 157, 165 (2014) (internal quotation marks omitted).

[30] Johnson, 559 U.S. at 139 (citing Black's Law Dictionary 717 (9th ed. 2009)).

[31] Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

[32] Watts v. United States, 394 U.S. 705, 708 (1969).

[33] Elonis v. United States, 575 U.S. 723, 738–39 (2015).

[34] Id. at 727.

[35] Counterman v. Colorado, U.S., No. 22-138.

[36] United States v. Doggart, 906 F.3d 506, 510–11 (6th Cir. 2018) (compiling cases).

[37] 76 F.3d 913 (8th Cir. 1996).

[38] Id. at 917.

[39] Id. at 924.

used near-identical language, the Dinwiddie court cited approvingly to an earlier case upholding that statute because its inquiry "depend[ed] upon the totality of the evidence demonstrating the specific intent of the defendant, not upon a subjective evaluation of the terms 'intimidate' and 'interfere.'"[40] Leaning on FACE's statutory definition of "intimidate" rather than drawing a bright line over what could or could not constitute a "threat," the court concluded that even though Dinwiddie "did not specifically say . . . 'I am going to injure you,' the manner in which [she] made her statements, the context in which they were made, and [the doctor's] reaction to them all support the conclusion that the statements were 'threats of force.'"[41] Therefore, to "differentiate between true threat[s] and protected speech," the threat must be analyzed "in light of [its] entire factual context" to determine whether it could be reasonably perceived as an intent to harm.[42]

Some circuits courts use a "reasonable speaker" standard while others use "reasonable listener" standard to interpret whether speech rises to the level of a threat. The "reasonable speaker" standard asks whether the issuer of the alleged threat would reasonably foresee their statement or expression to be interpreted as one. Conversely, the "reasonable listener" standard asks whether the recipient had a reasonably-founded perception of the statement or expression as a threat. The differences between these two approaches are diminished by the fact that whichever standard courts have adopted, they have interpreted "threat of force" to be a context-specific, fact-intensive analysis that can apply to a broad swath of conduct,[43] including that which may appear facially innocuous. A threat of force under FACE may be contingent ("if you don't…someone might…"), and imminence "is not a required element," meaning that a threat could be for a vague future time.[44]

Dinwiddie and many of the FACE threat cases in its wake have involved verbal statements that either explicitly threatened violence or implied a desire to commit harm. Statements deemed threats under FACE include "[w]here is a pipe bomb when you really need one,"[45] "just because you are young does not mean your life won't be taken early,"[46] and "[y]ou need to repent because you never know how long you have."[47] Issuers of veiled threats, as the Tenth Circuit explained in United States v. Dillard,[48] "cannot escape potential liability simply by using the passive voice or couching a threat in terms of 'someone' committing an act of violence."[49]

Other cases have clarified that a "threat of force" under FACE can be more abstract than verbal statements by focusing strongly on context. "Wanted" posters and posters near an abortion clinic director's home that displayed her name, "labeled her a 'Baby Killer' and warned that [] babies' blood is on her hands" were deemed threats.[50] Similarly, the Ninth Circuit held that "WANTED" and "GUILTY" posters publicizing the names of abortion-providing physicians constituted threats given that "WANTED" posters were circulated prior to the assassinations of several abortion-

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[40] United States v. J.H.H., 22 F.3d 821, 828 (8th Cir. 1994).

[41] Dinwiddie, 76 F.3d at 925.

[106] Id. (internal quotation marks omitted).

[43] Planned Parenthood, 290 F.3d at 1074 n.7 ("The difference [between the two tests] does not appear to matter much because all consider context, including the effect…on the listener.").

[44] United States v. Dillard, 795 F.3rd 1191, 1200 (10th Cir. 2015) (citing United States v. Turner, 720 F.3d 411, 424 (2nd Cir. 2013)).

[45] United States v. McMillan, 53 F. Supp. 2d 895, 898 (S.D. Miss. 1999).

[46] United States v. Scott, 958 F. Supp. 761 (D. Conn. 1997), aff'd and remanded sub nom. United States v. Vazquez, 145 F.3d 74 (2d Cir. 1998).

[47] Kraeger, 160 F. Supp. 2d at 375.

[48] 795 F.3d at 1191.

[49] Id. at 1201.

[50] Kraeger, 160 F. Supp. 2d at 375.

providing physicians.[51] Employing a "reasonable speaker" standard, the court held that a threat, when "the entire context and …circumstances" are taken into account, would be reasonably foreseen by the speaker to "be interpreted…as a serious expression of intent to inflict bodily harm."[52] In a post-Dinwiddie Eighth Circuit case, parking trucks in front of abortion clinic entranceways "sought to take advantage" of heightened security concerns and the aftermath of the Oklahoma City bombing, and coupled with the "manner in which [the trucks] were parked and the absence of any legitimate reason for their presence," was sufficient for clinic staff to be reasonably afraid and for a jury to find a threat had been made.[53]

In summary, FACE threat analysis considers individual facts and context, such as history between an accused FACE Act violator and plaintiff or whether the victim has been the target of abortion-related threats or violence broadly. Local and national events that do not involve either party can also be significant, such as heightened security concerns in the area due to an unrelated event[54] or oblique references to murders[55] and terror attacks.[56] So too can the "national climate of violence at reproductive health care clinics."[57]

2. "Physical obstruction."

At first blush, a "physical obstruction" might suggest a narrow, concrete type of obstacle, such as a blockade. Blockading, both via of physical barriers or crowding bodies, is a common tactic employed by antiabortion activists and can be a clear-cut FACE violation.[58] However, a closer reading reveals a broader interpretation. "Obstruction" is an "expansive" word with many definitions, but most generally refers to something that hinders or impedes "passage or progress."[59] "Physical" distinguishes the obstruction from the "emotional" or "intellectual" realm.[60] The statutory definition provided also supports a broader reading: a physical obstruction "render[s] impassable ingress to or egress from" a reproductive health provider, or "render[s] passage to or from such a facility…unreasonably difficult or hazardous."[61] Courts have interpreted "physical obstruction" to cover a wide variety of conduct, but few have defined it or the phrases within its statutory definition. While it seems like whether something is "impassable" should be straightforward to ascertain, "unreasonably difficult or hazardous" is more ambiguous. Like

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[51] Planned Parenthood, 290 F.3d at 1079.

[52] Id. at 1074–77.

[53] United States v. Hart, 212 F.3d 1067, 1072 (8th Cir. 2000).

[54] See Hart, 212 F.3d at 1072 (referring to heightened security concerns due to President Clinton visiting the city during the events at issue).

[55] Planned Parenthood, 290 F.3d at 1079.

[56] Hart, 212 F.3d at 1070 (clinic employees reminded of Oklahoma City bombing by presence of trucks).

[57] Kraeger, 160 F. Supp. 2d at 373.

[58] See, e.g., Press Release, Department of Justice, Eleven Defendants Indicted for Obstructing a Reproductive Health Services Facility in Tennessee (Oct. 5, 2022) (protesters indicted under FACE for blockading clinic and livestreaming patients).

[59] United States v. Sandlin, 575 F. Supp. 3d 16, 24 (D.D.C. 2021) (citing Oxford English Dictionary (3d ed. 2004)).

[60] Johnson, 559 U.S. at 138.

[61] 18 U.S.C. § 248(e)(4).

determining what is and is not a threat, concluding whether something is "unreasonably difficult" is "necessarily informed by context and not tied to any single metric or factor."[62]

Though no bright line rule exists, several cases make clear that "[p]hysical obstruction need not be direct."[63] "Requiring patients to navigate through . . . a chaotic scene" and "minor delays" can be sufficient to make access "unreasonably difficult."[64] Examples of physical obstructions under FACE include placing signs "so that they spanned two-thirds of the sidewalk,"[65] sitting three feet outside of an emergency exit door,[66] approaching cars in an attempt to communicate with their occupants, and "dropping an item on the ground and then retrieving it in slow motion" to delay access to a clinic parking lot.[67] However, conduct that makes accessing a clinic "unpleasant and even emotionally difficult" may not rise to the level of unreasonable difficulty.[68]

Perhaps in part because of the landscape of abortion access and legality prior to Dobbs v. Jackson Women's Health Organization,[69] in which even abortion-hostile states could not place an "undue burden" on abortion seekers[70] and had at minimum one abortion provider,[71] the existing FACE Act cases cover instances of obstructive antiabortion actors within the vicinity of abortion facilities. Therefore, courts have not yet paid much attention to the "passage" aspect of FACE's statutory definition, leaving the extent to which a provider or patient's physical path to a clinic is protected under FACE unknown. Oxford provides several potentially relevant definitions of "passage," all of which encapsulate a transition between places, a journey: "a way through something," "the action of going across, through, or past something," and "the permission to travel across a particular area of land."[72] These definitions are broad. A narrow reading might insist that "passage" only refers to the literal doorway that creates a barrier between the inside and outside of a reproductive health facility, "through" which providers and patients must ultimately enter. However, case history does not support reading "passage" so narrowly: physical obstructions in cases discussed above occurred in parking lots and even on the sidewalk beyond a clinic's property.[73]

Furthermore, reading the "passage" clause so narrowly as to only apply to entering or exiting a facility would give it a virtually identical meaning to the first clause that governs "ingress…or egress."[74] The linguistic interpretive canon of assigning a meaning to a statutory word or phrase with a presumption against an interpretation that would make it superfluous disfavors reading "passage" to mean "ingress…or egress." Proponents of a narrower reading might counter that the first clause's

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[62] New York v. Griepp, 991 F.3d 81, 105 (2nd Cir. 2021), reh'g granted and opinion vacated sub nom. People v. Griepp, 997 F.3d 1258 (2nd Cir. 2021), and on reh'g sub nom. New York by James v. Griepp, 11 F.4th 174 (2nd Cir. 2021) (opinion vacated due to disagreement on standard of review).

[63] Id. at 104.

[64] Id. at 105.

[65] Id. at 106.

[66] United States v. Mahoney, 247 F.3d 279, 283 (D.C. Cir. 2001).

[67] New York ex rel. Spitzer v. Operation Rescue Nat'l, 273 F.3d 184, 194–95 (2nd Cir. 2001).

[68] Id. at 195.

[69] 142 S. Ct. 2228 (2022).

[70] June Med. Servs. v. Russo, 140 S. Ct. 2103, 2112–13 (2020) (reaffirming Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016), as revised (June 27, 2016) and Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992)).

[71] Alice F. Cartwright, Mihiri Karunaratne, Jill Barr-Walker, Nicole E. Johns, & Ushma D. Upadhyay, Identifying National Availability of Abortion Care and Distance From Major US Cities: Systematic Online Search, 20 J. MED. INTERNET RES. 4–5 (2018) (finding six states with only one abortion provider).

[72] Oxford Advanced American Dictionary (10th ed.).

[73] Griepp, 991 F.3d at 106.

[74] 18 U.S.C. § 248(e)(4).

"impassable" and the second clause's "unreasonably difficult or hazardous" are sufficiently different that a narrow reading of "passage" would not render the second clause superfluous. Instead, the noscitur a sociis canon—which prescribes avoidance of "ascribing to one word a meaning so broad that it is inconsistent with its accompanying words"[75]—suggests that "passage" should be limited by "ingress . . . or egress" in the earlier clause and therefore read as essentially interchangeable with it. However, the presumptively deliberate choice to use "passage" instead of repeating "ingress . . . or egress" in the second phrase suggests that the word is operating as a catch-all to capture obstruction that does not fit cleanly into forms of obstruction not occurring in a literal doorway. Other language in the second clause, "unreasonably difficult or hazardous," focuses more upon ultimate access to care than the first clause, which further suggests that it should be read as a catch-all to encompass a broader set of activity, for a judge or jury to decide if applicable in any given case.

Ruling out the narrowest construction of "passage" does not answer the question of where in someone's journey to a reproductive health facility FACE Act protection begins. If a pregnant woman's domestic partner intentionally obstructs her from leaving their home in order to make her late to or miss an appointment at an abortion clinic, is that a FACE violation? What about if an antiabortion activist slashes the tires of an abortion-providing physician's car to prevent them from getting to work? In both of these hypotheticals, the affected person is at the beginning of their "passage" from Point A (their domicile) to Point B (the reproductive health facility). They are in the process of carrying out a definitive plan to reach their desired location that is interrupted and obstructed by the respective instigator. A natural reading of "rendering passage…unreasonably difficult or hazardous"[76] allows for FACE to cover both of these hypotheticals. The scenarios discussed above would likely cause longer delays and constitute more intrusive interference than conduct found to be FACE Act violations in cases discussed above. It would be illogical to exclude patients and providers who have faced meaningful interference with accessing a clinic simply because the interference occurred at a different point in the process of their path to a facility. Drawing a line of a specific proximity to a clinic a patient or provider must reach to receive FACE Act protection would necessarily be an arbitrary choice and would not be supported by the statute's text. "FACE is by its own terms broad"[77] and interpretive rules demand presuming linguistic choices are deliberate. Therefore, it makes sense to interpret "passage" as encompassing the entire journey a patient or provider takes. However, "passage" could not be overbroad as to include any potential obstacle to an abortion seeker or provider attempting to reach a facility. Limiting factors might include whether the individual has taken steps to begin traveling and/or has a plan to do so in place (e.g., an appointment made at a clinic, tickets purchased or reservations made).

Despite the fact that courts have not yet addressed and answered the extent to which FACE protects a physical journey, some scholars have accepted that FACE only applies to the immediate vicinity of clinics,[78] perhaps factoring in that most FACE cases have been brought against clinic protesters. The presumption against a novel interpretation of a statute that conflicts with how it has been utilized previously[79] could be a formidable challenge to interpreting the statute to encompass

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[75] Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995).

[76] 18 U.S.C. § 248(e)(4).

[77] Griepp, 991 F.3d at 92.

[78] See, e.g., Kelly Jo Popkin, Faceing Hate: Using Hate Crime Legislation to Deter Anti-Abortion Violence and Extremism, 31 WIS. J.L. GENDER & SOC'Y 103, 104 (2016) (citing DAVID S. COHEN & KRYSTEN CONNON, LIVING IN THE CROSSHAIRS: THE UNTOLD STORIES OF ANTI-ABORTION TERRORISM, 208 (2015)).

[79] Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 155 (2000) (holding that "actions by Congress over the past 35 years preclude[d]" a novel statutory interpretation).

conduct outside of the immediate vicinity of a reproductive healthcare facility. However, the unprecedented circumstances created by Dobbs justify reinterpretation. Reviving preexisting statutes to apply to circumstances to which they were not initially written to address is not without precedent. One need only look to the Supreme Court's decision in Bostock,[80] holding that the Civil Rights Act of 1964's prohibition of discrimination "because of…sex" encompassed discrimination based upon gay or transgender status regardless of "the limits of the drafters' imagination."[81]

C. Legislative History

The FACE Act emerged to as response to the Supreme Court's foreclosure of a legal mechanism for abortion providers to protect themselves, and in the midst of a wave of violence that threatened abortion access. The aftermath of Dobbs poses a comparable—if not more existential—threat to the ability of patients to access abortion care and the amount of providers willing and able to offer it. Therefore, if FACE's goals as set forth by its legislative history are to survive, it must be interpreted expansively.

The Senate Report begins by referencing an "interstate campaign" of violence, obstruction, and intimidation targeting "abortion-related services."[82] FACE was therefore in some sense a recognition of the unique issue of domestic terrorism directed towards abortion providers, which is ideologically driven but does not fit neatly into hate crime laws.[83]

The Senate Report also makes clear that Bray was top of mind for legislators: the statement of purpose explains that "in the Bray decision, the Court denied a remedy…to persons injured by the obstruction of access to abortion-related services" and therefore Congress found that "legislation is necessary to prohibit the obstruction of access. . . to abortion-related services."[84]

Abortion advocates argued at the time that a "nationwide shortage of trained physicians willing to provide abortions" could be attributed to the violence.[85] The legislative history suggests these concerns were well-taken, as it discusses not only preventing and punishing specific disruptive or violent acts, but ameliorating the consequences of those actions with respect to abortion access and public health. The Senate Report explains that "women are being denied access to, and health care providers are being prevented from delivering, vital reproductive health services," and that there are "increased medical risks" and detrimental effects on "public health and safety" as a result of denial of access to reproductive care.[86] Indeed, the promotion of "health and safety" is the first item listed under the statement of the statute's purpose.[87]

Along with public health, the Senate Report indicates commitment to "women's ability to exercise full enjoyment of rights secured to them."[88] One interpretation of this communicated legislative intent is that it was only meant to apply insofar as Roe remained settled law. If FACE was meant to bolster, rather than enshrine, abortion access, that leaves an open question as to FACE's place when abortion itself is no longer a right. However, the constitutional right to abortion is not the only right implicated by FACE: there is also the right to travel, and the right to enjoy

[80] Bostock v. Clayton County, Ga., 140 S. Ct. 1731 (2020).
[81] Id. at 1737.
[82] S. REP. NO. 103–117, at 12. (1993).
[83] Popkin, supra note 78, at 110.
[84] S. REP. NO. 103-117, at 14–15. (1993).
[85] Figueroa & Kurth, supra note 1, at 248.
[86] S. REP. NO. 103-117, at 12–14 (1993).
[87] Id. at 15.
[88] Id. 13.

reproductive healthcare protections in haven states. Indeed, the Senate Report refers to "rights secured…by Federal and State law, both statutory and constitutional."[89]

The broader goals of the law as described by the legislative history suggest that an expansive interpretation is necessary for the spirit and purpose of the law to survive. While FACE applies generally to reproductive health facilities, the concerns about denial of access and negative consequences upon public health are specifically "abortion-related."[90] The violence and "climate of fear and intimidation"[91] under FACE's surface were occurring as a result of the ongoing abortion fight. Abortion access and preventing the health consequences caused by its denial is the reason for the statute's existence. FACE should not be interpreted, then, as protecting reproductive health services excluding abortion by virtue of Dobbs. For FACE and Dobbs to be reconciled, the statute should be construed as protecting abortion access as limited by Dobbs; while states may determine if and under what circumstances abortion is legal, FACE preserves a federal interest in abortion access and ensuring people can safely access reproductive health services to the extent that it is legal in a physical location.

III. FACE POST-DOBBS

A. Abortion Access Issues

FACE case history demonstrates courts struggling over threats that are implicit, obstruction that is indirect, and what rises to the level of "unreasonably difficult." Context-specific case-by-case inquiry will only become more complicated, and more likely to result in inconsistent decisions, with a patchwork of disparate state abortion laws. Under the current statutory framework, financial threats must involve an implied threat of force or reasonably suggest one, or else will not fall under FACE; this significant loophole would need to be resolved by an amendment, discussed in Part IV. Because exposures of privacy have previously been found to be threats under FACE, tactics like livestreaming are potentially viable FACE cases, though plaintiffs would have to demonstrate a causal link between exposure and potential harm. Physical obstruction tactics that seek to limit travel clearly violate FACE under an expansive reading, though more indirect tactics towards achieving this goal must strongly indicate such an obstructive intent if they are to fall under FACE. A broader interpretation of FACE would also allow the statute to address stalking and harassment of providers that has previously fallen through the cracks.

1. Threats.

A woman in Wisconsin, where abortion is banned, texts her ex-boyfriend that she intends to terminate her pregnancy. He responds, "you'd better not." If there is a past history of violence or abuse in their relationship, she has a good case that a reasonable person in her circumstances would interpret his statement as a threat of retaliation and thus actionable under FACE. What if there is no past abuse, but she is aware that he and his family hold strong antiabortion views and are gun-owners, causing her to fear violent retaliation? In this instance, both the statement and the surrounding context might be too general or vague for courts to find a threat of force, even under a broader interpretation of the statute. Her ex-boyfriend might insist that his statement was simply warning her that she could face criminal liability for obtaining an abortion in their state. The

[89] Id. at 13.
[90] Id. at 14.
[91] Figueroa & Kurth, supra note 1, at 248.

statement is vague enough that a jury might find his explanation as reasonable, if not more so, as hers. That outcome might be different if they had previously discussed that she was considering traveling to Illinois to obtain an abortion legally, so that he was aware that she would not be violating any laws, therefore significantly undermining his version of events. Would it be different if this scenario took place in Idaho, which has an S.B. 8-style law that imposes civil litigation? FACE only prohibits threats of force, so threats of retaliatory civil litigation would not be actionable. Given First Amendment considerations, courts may err on the side of caution and only find that a threat has been made if the implied harm is more explicit, such as with references to death or violence ("you'd better not, or you'll get hurt"). Because of the context specificity of threat analysis, some legitimate threats may slip through the cracks, especially when intent is ambiguous.

FACE can protect against litigation threats so long as they are also threats of force, but there are still significant loopholes given the mechanism by which abortion bounty laws impose liability and the range of threats they may inspire. Threats of litigation in the context of abusive relationships and/or pregnancies that are the result of rape can carry with them an implicit threat of continued or exacerbated violence. Even if a jury finds that threats of civil litigation are being exploited as a means of perpetuating an abusive relationship and therefore constitute a "threat of force," courts would find themselves in the difficult position of determining whether such a finding would "interfere with the enforcement" of civil laws.[92] Privately-enforced laws typically impose liability on abortion providers and anyone who helps an abortion seeker, not the abortion seeker herself, so if she is the recipient of the threats, she can likely bring the suit without running into FACE's own statutory limits. The situation is more complicated if the abusive partner or rapist threatens a pregnant person's friends or family. Those who "aid and abet" abortion are targeted by abortion bounty laws, but only private parties "involved in providing or obtaining reproductive healthcare services" may bring FACE Act suits.[93] This leaves a potentially significant loophole in FACE's protective ability from S.B. 8-style civil suits.

Exposure of privacy as a means of making individuals targets for providing or having abortions falls within the pattern of intimidation tactics that have been found to be FACE violations. If a "WANTED" poster distributed locally creates a risk or sufficiently suggests one to abortion providers, it stands to reason that exposing similar information to a wider online community who may then commit an act of vigilante violence does as well. Abortion providers are routinely "doxed," in which personal information such as their address is compiled and listed on a website, which puts them at increased risk of being stalked, harassed, assaulted, or even killed; whether or not such websites or posts on them explicitly advocate violence, "the dissemination of doctors' personal information through [a] public platform is itself a form of harassment that breaches doctors' privacy and may jeopardize their safety."[94]

Tactics of exposure and intimidation that harken back to the 1990s continue today,[95] suggesting that antiabortion groups still use the association between those tactics and assassination to intimidate. Nevertheless, with the WANTED posters so historically linked to high-profile murders, courts narrowly interpreting FACE may find that that unusual context does not extend

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[92] 18 U.S.C. § 248(d)(4).

[93] Patel, supra note 9, at 281.

[94] Joanne D. Rosen & Joel J. Ramirez, When doctors are "doxxed:" An analysis of information posted on an antiabortion website, 115 CONTRACEPTION 1, 3 (2022).

[95] See, e.g., Hannah Sarisohn & Elizabeth Wolfe, Anti-abortion activist charged with stalking a California doctor who provides abortions, CNN, May 20, 2022, https://perma.cc/WU2W-JHR6 (antiabortion group placed stickers reading "a killer lives in your neighborhood" on doctor's and neighbors' doors and posted flyers with link to website identifying doctor and alleging "false, inflammatory claims").

more generally to doxing and other forms of online harassment that circulate personally identifying information. However, that logic creates the grim inference that that public exposure of providers' identities and revealing information only constitutes a FACE violation once it results in one or more deaths. Similarly, while livestreaming patients or targeting them with mobile geofences may indirectly put them at risk, it may be difficult for those livestreamed to show a causal link between those acts and future harm until such harm actually occurs. With the internet as "a powerful tool for anti-abortion extremists, likely contributing to an increase since the 1990s in death and other violent threats directed against providers,"[96] it may not be long before such an event occurs. In the interim, courts should consider the full historical context of weaponized exposure against abortion providers and the "national climate"[97] around abortion in determining what constitutes a threat.

2. Physical obstruction.

Laws that create abortion bounties encourage vigilantism by deputizing private citizens as bounty hunters. Scholars and legal commentators have noted similarities between S.B. 8 and the Fugitive Slave Act[98] in terms of their legal mechanism and in that they are designed to circumvent the legal protections of one group while "harnessing the avarice and malice" of another to "stamp out" the rights of the first.[99] The Fugitive Slave Act drove "professional slave-catchers" to venture into "abolitionist strongholds" to kidnap formerly enslaved people,[100] encouraging and enabling slave patrols and militias. Abortion bounty laws may similarly inspire more aggressive vigilante tactics.

FACE defines "interfere with" as "to restrict a person's freedom of movement."[101] Efforts to prevent an individual from leaving a state clearly fall under such a restriction. Literal physical restraint is not required to prove interference under the statute.[102] Intimidation at state borders, stalking, and surveillance of patients in an effort to create a body of evidence that someone has obtained or provided an abortion across state lines can therefore fall under "physical obstruction." If a blockade makes clinic access "unreasonably difficult," depriving abortion seekers of any potential means of obtaining an abortion by foreclosing the possibility of interstate travel is "practically impossible."

Beyond interstate travel, an expansive interpretation of FACE could address some of the "targeted harassment of providers" that FACE has been criticized for failing to sufficiently address in the past, such as stalking and other activity that takes place outside of the "immediate vicinity" of

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[96] Brief for The Feminist Majority Found., et al., as Amici Curaie, p. 17, Dobbs, 142 S. Ct.

[97] Kraeger, 160 F. Supp. 2d at 373.

[98] See, e.g., Isabella Oishi, Legal Vigilantism: A Discussion of the New Wave of Abortion Restrictions and the Fugitive Slave Acts, 23 GEO. J. GENDER & L. 1, 5 (2022); see also, Michele Goodwin, The Texas Abortion Ban Is History Revisited, MS. MAG., Sept. 1, 2021, https://perma.cc/42GV-WVDJ; Aziz Huq, What Texas's abortion law has in common with the Fugitive Slave Act, WASH. POST, Nov. 1, 2021, https://perma.cc/6DX6-S7SF; Michael Hiltzik, Threats to criminalize out-of-state abortions are a scary reminder of 1850s America, L.A. TIMES, Jul. 12, 2022, https://perma.cc/S46Q-4VDX; Elie Mystal, Anti-Abortion Politicians Are Now Taking Inspiration From the Fugitive Slave Act, NATION, Mar. 11, 2022, https://perma.cc/HUU6-7WPA.

[99] Huq, supra note 98.

[100] Gautham Rao, The Federal "Posse Comitatus" Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America, 26 LAW & HIST. REV. 1, 24 (2008).

[101] 18 U.S.C. § 248(e)(2).

[102] United States v. Mahoney, 247 F.3d 279, 283–84 (D.C. Cir. 2001).

clinics.[103] If the entirety of a doctor's "passage" from home to work is protected under FACE, she can argue that safety concerns created by stalking that require her to frequently change routes and vehicles on the way to work and even move homes[104] make her journey "unreasonably difficult." While following someone from behind or picketing outside their home may not directly impede their path, this conduct is comparable to other indirect forms of FACE violations, such as presence outside of emergency exits or lingering in parking lots, that raise safety concerns and cause delays.

[103] Popkin, supra note 78, at 105.

[104] Nina Liss-Schultz, Wearing Disguises, Hiring Bodyguards, Constantly Changing Your Route Home: Just Another Day at Work at Planned Parenthood, MOTHER JONES, Dec. 4, 2015, https://perma.cc/K7S5-AHLK.

Applicant Details

First Name	**Julio**
Last Name	**Colby**
Citizenship Status	**U. S. Citizen**
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Contact Phone Number	**2813890659**
Other Phone Number	**2813890659**

Applicant Education

BA/BS From	**University of Texas-Austin**
Date of BA/BS	**May 2019**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 23, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Block, Sharon
sblock@law.harvard.edu
617-495-9265
Sachs, Benjamin
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617-384-5984
Lopez, David
david.lopez@law.rutgers.edu
8623018898

This applicant has certified that all data entered in this profile and any application documents are true and correct.

JULIO QUIROZ COLBY
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June 12, 2023

The Honorable Juan R. Sanchez
United States District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Chief Judge Sanchez:

I am writing to apply for a clerkship in your chambers for the 2024 term. I am currently a rising third-year law student at Harvard Law School and the Developments in the Law Chair of the *Harvard Law Review*.

Attached please find my resume, law school transcript, writing sample, and recommendation letters from the following professors:

- Professor Benjamin I. Sachs, bsachs@law.harvard.edu, (617) 384-5984
- Professor Sharon K. Block, sblock@law.harvard.edu, (202) 302-1801
- Professor P. David Lopez, pdlopez@law.harvard.edu, (973) 353-5551

As a law student pursuing a career in community and movement lawyering, I am particularly interested in clerking on a district court to understand the role, responsibility, and decisionmaking of federal judges in working people's encounters with the American legal system. As the son of Latin American immigrants, I am especially invested in seeing how the justice system works for people in my community.

If there is any other information that would be helpful to you, I would be happy to provide it. Thank you for your time and consideration.

Sincerely,

Julio Colby

Enclosures

JULIO QUIROZ COLBY

3 Linnaean St. #2 • Cambridge, MA 02138 • (281) 389-0659 • jcolby@jd24.law.harvard.edu

EDUCATION

Harvard Law School, Cambridge, MA
Candidate for J.D., May 2024
Honors: *Harvard Law Review*, Developments in the Law Chair
Activities: Professor Kristin Stilt, Teaching Assistant (Property Law)
La Alianza, Public Interest Chair
Law and Social Change Program of Study, Student Fellow
OnLabor, Student Contributor

The University of Texas at Austin, Austin, TX
B.A. with Honors in International Relations and Global Studies, May 2019
Honors: Posse Foundation Full Tuition Leadership Scholarship
Activities: Semester abroad and independent research project at Tecnológico de Monterrey Ciudad de México, Mexico

PUBLICATIONS

Recent Legislation, *CAL. LAB. CODE §§ 96, 1470–1473 (West 2020 & Supp. 2023)*, 136 HARV. L. REV. 1748 April 2023

EXPERIENCE

Office of Senator Elizabeth Warren, Washington, D.C. Summer 2023
Legal Fellow
Preparing decision memoranda for Senator recommending she cosponsor bills, sign on to letters, and support or oppose legislation and nominees; composing oversight letters sent from Senator's desk to government agencies and private parties; designing legislative and oversight strategy to address prison health conditions; and building out policy toolkit for market consolidation in agricultural industry.

Center for Labor and a Just Economy, Cambridge, MA Spring 2023–Present
Research Assistant to Professors Sharon Block and Benjamin I. Sachs
Preparing memorandum outlining federal constitutional limits to state legislation absent federal labor law preemption.

Harvard Immigration and Refugee Clinic, Cambridge, MA Spring 2023
Clinical Student
Working directly with clients in a variety of immigration proceedings, including preparing minors for asylum add-on petition interview, drafting affidavit of supporting witness to include in supplemental filing, and preparing client for direct- and cross-examination questions for asylum hearing in immigration court.

Southern Migrant Legal Services, Nashville, TN Summer 2022
Legal Intern
Assisted in all stages of pre-trial litigation at farmworker employment law legal aid including direct Spanish-language outreach to migrant farmworkers across Southeastern US; completing new client intakes; meeting with potential clients and completing internal case evaluation memoranda; assembling discovery responses; deposition note-taking and analysis for summary judgment motion; building proof chart; preparing for settlement conference; and submitting subpoenas and FOIA requests. Completed research memoranda on NLRA retaliation protections and post-dissolution corporate liability for ongoing litigation.

Harvard Law School, Cambridge, MA Summer 2022
Research Assistant to Visiting Professor P. David Lopez
Analyzed provisions, mechanisms, and commitments in the United States-Mexico-Canada Agreement for research memorandum identifying new protections for labor organizing and employment discrimination in Mexico and the United States.

Harvard Advocates for Human Rights, Cambridge, MA Fall 2021
Sovereign Immunity Project Team Member
Conducted independent legal research and drafted comparative law memorandum on countries' compliance with International Court of Justice decisions to be used by a human rights NGO seeking to enforce a judgment against a sovereign nation.

CS DISCO, Inc., Austin, TX Summer 2019–Summer 2021
Revenue Operations Analyst II
Led software implementation for eDiscovery professional services department supporting four teams with differing needs and nearly 100 users. Recruited to ten-person taskforce led by CEO to critically deconstruct, analyze, and build desired state of business processes, metrics, and systems.

Refugee and Immigrant Center for Education and Legal Services (RAICES), Austin, TX Fall 2018
Legal Intern
Translated and transcribed clients' verbal declarations and written legal documents to be used in asylum proceedings. Compiled and maintained client files for immigration attorney. Created presentation to explain U.S. immigration system processes to clients.

PERSONAL

Native speaker of English and Spanish, limited French and Portuguese
Passionate guitarist, follower of international politics and Eastern philosophy, avid jazz and indie music fan

Harvard Law School

Date of Issue: June 2, 2023
Not valid unless signed and sealed
Page 1 / 2

Record of: Julio Q Colby
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2021 Term: September 01 - December 03

1000	Civil Procedure 5 Sachs, Stephen	H	4
1001	Contracts 5 Bar-Gill, Oren	H	4
1002	Criminal Law 5 Natapoff, Alexandra	H	4
1006	First Year Legal Research and Writing 5A Toomey, James	P	2
1005	Torts 5 Goldberg, John	P	4

Fall 2021 Total Credits: 18

Winter 2022 Term: January 04 - January 21

1054	Advocacy: The Courtroom and Beyond Gershengorn, Ara	CR	2

Winter 2022 Total Credits: 2

Spring 2022 Term: February 01 - May 13

1024	Constitutional Law 5 Gersen, Jeannie Suk	P	4
3107	Critical Corporate Theory Lab Hanson, Jon	H	2
1006	First Year Legal Research and Writing 5A Toomey, James	P	2
1003	Legislation and Regulation 5 Rakoff, Todd	P	4
1004	Property 5 Mack, Kenneth	H	4

Spring 2022 Total Credits: 16
Total 2021-2022 Credits: 36

Fall 2022 Term: September 01 - December 31

3176	A Democracy Initiative Lessig, Lawrence	H	2
2000	Administrative Law Freeman, Jody	P	4
8052	Animal Law & Policy Clinic Meyer, Katherine	WD	0
2142	Labor Law Sachs, Benjamin	H	4
2067	Organizing for Economic Justice in the New Economy Block, Sharon * Dean's Scholar Prize	H*	2

Fall 2022 Total Credits: 12

Winter 2023 Term: January 01 - January 31

2330	International Labor Migration Rosenbaum, Jennifer	H	2

Winter 2023 Total Credits: 2

Spring 2023 Term: February 01 - May 31

8020	Harvard Immigration and Refugee Clinic Ardalan, Sabrineh	H	3
2115	Immigration and Refugee Advocacy Ardalan, Sabrineh	H	2
3139	Law and the Legal System through the Lens of Latinx/a/o Communities Lopez, P.	H	2
2212	Public International Law Blum, Gabriella	H	4

Spring 2023 Total Credits: 11
Total 2022-2023 Credits: 25

Fall 2023 Term: August 30 - December 15

2897	Contemporary Issues in Constitutional Law Liu, Goodwin	~	2
2069	Employment Law Sachs, Benjamin	~	4
2079	Evidence Rubin, Peter	~	2
2169	Legal Profession Gordon-Reed, Annette	~	3

Fall 2023 Total Credits: 11

Spring 2024 Term: January 22 - May 10

2050	Criminal Procedure: Investigations Natapoff, Alexandra	~	4
8043	Crimmigration Clinic Torrey, Philip	~	3

Spring 2024 Total Credits: 7

continued on next page

Harvard Law School

Record of: Julio Q Colby

Date of Issue: June 2, 2023
Not valid unless signed and sealed

Total 2023-2024 Credits:	18
Total JD Program Credits:	79

End of official record

HARVARD LAW SCHOOL
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Transcript questions should be referred to the Registrar.
~~~~~~

In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.
~~~~~~

A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems
Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)
Magna cum laude Next 10% of the total class following *summa* recipients
Cum laude Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

June 08, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Julio Colby to be your clerk. I am excited to share with you my support for Julio's application for a clerkship with you. I have had the opportunity to observe Julio's work in a number of settings and have come to admire his dedication to studying the law for the purpose of advancing workers' rights and pursuing social change. Even a quick skim of Julio's transcript reveals the depth of his commitment to these issues and to taking advantage of all the opportunities that Harvard Law School provides to advance them.

I was fortunate to have Julio as a student in a seminar I teach on ways that workers are organizing outside of the traditional labor movement. The class required extensive reading and synthesizing different kinds of accounts of worker power building. In every class we would analyze the theory of change represented by the activity of the workers at the center of that class's study, the legal support or challenge for the activity and the practical impact of the activity. I was impressed by Julio's ability to switch back and forth between analysis of theory and practice. Some of his classmates were clearly more comfortable in one realm or the other. Julio was able to make valuable contributions throughout.

Most importantly, I appreciate Julio's rare ability to be an active and valuable contributor to the discussion but not to dominate it. It is always a challenge in a classroom to maintain a balance among participants and to keep the conversation moving. I think the ability to know when to step up and step back is a particularly important skill for a social justice lawyer. I believe it would be a skill that you would value in chambers.

Julio submitted an excellent paper and final project for the seminar. Based on the combination of his thoughtful contributions to class discussions and the superior quality of his paper and final project, Julio earned a Dean's Scholar Prize in my class – the highest grade a classroom professor can grant at HLS.

During this past year, I also had the opportunity to work with Julio on a piece he wrote for the Harvard Law Review. Julio wrote an essay on the Fast Food Accountability and Standards Recovery Act, which was enacted in California last year. Julio's "Recent Legislation" essay focused on the likelihood that the FAST Act would withstand challenge on the basis that it is preempted by federal labor law. He did an excellent job of explaining this novel legislation, articulating the different strains of federal labor law preemption and then predicting how courts would apply the one to the other. Because the FAST Act is a new model of legislation, Julio's piece required him to project and extrapolate from doctrine that was developed in different circumstances. I found Julio very open to discussing his early drafts of the essay. He did a very good job of incorporating suggestions and sharpening his analysis. This experience again suggests that he would be good collaborator for you in chambers.

Finally, Julio has undertaken a research project for me, examining how federal Constitutional rights would apply to labor organizing in the absence of protection for such rights under federal labor law. This research project took a fair degree of creativity as, by definition, the predicate conditions that I asked Julio to address do not actually exist. I was very impressed that Julio and his research partner on this project came up with eight different Constitutional provisions that could be implicated if federal labor law preemption was lifted and states took action to limit collective bargaining rights. This research is very useful for me in my own work probing this question.

I have also had the chance to talk with Julio about his fellowship with Senator Warren this summer. I had the privilege of working in the Senate for Senator Kennedy and so have some insight into the kind of skills necessary to succeed as a Senate staffer. I have every confidence that Julio will make a great contribution to Senator Warren's office. I'm looking forward to hearing about his adventures when he returns to Cambridge in the fall.

My observation about Julio that may be most relevant for you is what a joy it is to work with him. He is a thoroughly decent and compassionate person. I very much looked forward to our conversations about the law, current events and how to make HLS an even better place to be. He would be a very positive presence in your chambers, not only because of his legal acumen but also because of the quality of his character.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Sharon Block

Sharon Block - sblock@law.harvard.edu - 617-495-9265

June 08, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write on behalf of Julio Colby, a rising third-year student at Harvard Law School, who has applied for a clerkship in your chambers. I recommend Mr. Colby highly. He has been a student in two of my courses, and he is a contributor to the blog I edit. In each of these settings, Mr. Colby has performed extremely well. He also has an impressive commitment to using law in the service of the public. I have no doubt that Mr. Colby will make an outstanding law clerk.

I first met Mr. Colby when he was a student in my 1L reading group, The Struggle for Workers' Rights on Film. This course is a relatively informal small-group class taught in the early months of a student's time at the law school. My course uses a series of movies to explore basic themes in labor movement history and labor law. Mr. Colby stood out in the course for his ability to offer insightful comments about the themes of the movies we were discussing while also bringing to bear his personal and political commitments in a productive way. Mr. Colby's manner of intervention was also notable: he speaks respectfully, thoughtfully, while also making strong arguments that routinely persuaded his classmates.

During the Spring 2022 semester, Mr. Colby was a student in my Labor Law class. Labor Law is a large, black-letter law class taught in the Socratic style. When Mr. Colby took Labor Law there were approximately 90 students in the class, and Mr. Colby was among the strongest. His exam was excellent, earning him an H grade for the course. On each of the exams' three questions, Mr. Colby displayed a strong command of the doctrinal material in the course as well as the more theoretical material. Mr. Colby also was an important contributor to class discussions throughout the semester. He was completely prepared for every class session and answered all the questions I put to him with depth and accuracy. I remember in particular his answers to my questions about American National Insurance Company, a case regarding management functions clauses.

Based on Mr. Colby's performance in my courses, I have asked him to work as a student contributor for OnLabor.org, a labor law blog that I edit. As a contributor, Mr. Colby writes the News & Commentary feature approximately once every two weeks, a task that involves consolidating large amounts of material into short pieces of writing that are clear, accurate and accessible. Doing this work successfully requires both clarity of thinking and strong writing skills –both which Mr. Colby possesses. Mr. Colby's posts are uniformly accurate and extremely well written. He is an exemplary contributor to the blog.

I also have had the privilege of supervising Mr. Colby's "Recent Thing" for the Harvard Law Review, which he wrote on California's new sectoral labor law, the FAST Act. The questions raised by the FAST Act, including whether and why the legislation is preempted by federal labor law, are both complicated and of the utmost importance. Mr. Colby's piece represents one of the first sustained legal treatments of these questions, and it is a model of clarity and persuasive argument.

Finally, I have had the opportunity to get to know Mr. Colby through his service as a student fellow for the Law and Social Change Program of Study (of which I am faculty director). In this capacity, Mr. Colby has taken responsibility for organizing a number of student events designed to encourage interested participants to pursue careers in social change work. He is terrifically well-organized, hard-working and an excellent leader among his peers. Mr. Colby is a pleasure to know and work with. He combines all of this intellectual talent with a humility that can be all too rare among law students. This combination of traits will make Mr. Colby a successful lawyer and a marvelous colleague. I have no doubt that they will also make him a terrific law clerk and a welcome addition to any chambers.

Thank you for your attention to Mr. Colby's application. I would be happy to discuss it further.

Sincerely,

Benjamin Sachs

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May 24, 2023,

Dear Honorable Judge,

I am writing to strongly recommend Julio Colby for a clerkship in your chambers.

I am a University Professor at Rutgers Law School-Newark campus, where I served as the Dean on that campus from 2018-2021. I have taught at several law schools, including – as I will discuss – Harvard, as well as NYU and Georgetown. In total I have taught hundreds of law students. Prior to entering academia, I served as the General Counsel of the Equal Employment Opportunity, twice appointed by President Barack Obama and confirmed by the U.S. Senate, where I also supervised and mentored dozens of law students. For the reasons I will discuss below, I regard Mr. Colby as one of the top one-percent of the students I have taught, mentored, and/or supervised during my career.

Following my service as Dean in July 2021, I spent the spring semester of my one-year sabbatical at Harvard Law School where I served as a Visiting Professor. It is in this capacity where I had the pleasure of first meeting Mr. Colby when he served as one of my research assistants examining the labor safeguards of the recently-adopted United States Mexico Canada Free Trade Agreement.

Given his outstanding work, I was pleased to have Mr. Colby enrolled this semester as a student in a seminar entitled "Law and the Legal System through the Lens of Latinx/a/o Communities," where he received a "high pass," the highest grade available. As part of the seminar, Mr. Colby wrote an outstanding paper critically analyzing and deconstructing the federal H-2A worker program and making strong recommendations for reform. One original and powerful quality of the paper is how Mr. Colby interspersed the doctrinal analysis with narratives of interviews he conducted with predominately Mexican national agricultural workers as part of an earlier summer internship.

In addition, as part of a seminar centered on class engagement, Mr. Colby participated frequently in the class always offering insightful comments and written reflections. During these discussions, I was always impressed by the high esteem he was afforded by his peers. Further, Mr. Colby engaged well with the inter-disciplinary materials and approach of the seminar but, more than his peers, always drilled down on some of the thorny doctrinal questions embedded in the broader discussion, analyzing legal materials from many

perspectives as both a deep and creative thinker. Given this clear love of the law and justice, I was not surprised to learn Mr. Colby also serves as an editor of the Harvard Law Review.

One other personal note. Mr. Colby devoted last summer to working on immigrant worker issues with Southern Migrant Legal Services in Nashville, and this summer will be working on labor issues with Senator Elizabeth Warren. As someone who also attended Harvard from a state university, I appreciate the enormous resilience and commitment Mr. Colby has demonstrated to navigate a new and elite space, achieve academic excellence, and remain both humble and focused on providing voice and representation for those too often denied adequate legal services and justice. Needless to say, I am very eager to see what remarkable things he will accomplish in his legal career.

In sum, based on these tremendous characteristics, I have no doubt that Mr. Colby will be a productive, collegial, and valued member of your chambers, and continue to make meaningful and positive contributions to the legal profession, as well as further broader values of access to justice. I am also certain, Mr. Colby will "pay forward" any clerkship opportunity by opening doors to others.

Please reach out if you have any questions. You may contact me at (862) 301-8898.

Sincerely,

David Lopez

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WRITING SAMPLE

Drafted Fall 2022–Spring 2023

The attached is the print version of my Comment published in the April 2023 issue of the *Harvard Law Review* arguing that the Fast Food Accountability and Standards Recovery Act, a California law that creates a council to set minimum employment standards for the fast-food industry, is not preempted by the National Labor Relations Act and should serve as a model for local labor legislation.

RECENT LEGISLATION

LABOR LAW — NLRA PREEMPTION — CALIFORNIA LAW CREATES COUNCIL TO SET MINIMUM WORK STANDARDS FOR FAST-FOOD INDUSTRY. — CAL. LAB. CODE §§ 96, 1470–1473 (West 2020 & Supp. 2023) (effective Jan. 1, 2023).

In 2012, two hundred fast-food workers in New York City walked out of their jobs demanding $15 an hour and a union.[1] Since then, the "Fight for $15" campaign has spread to become a global movement demanding (and winning) wage increases for low-income workers in cities across the country.[2] Faced with a "weak" and "rigid" federal labor statute[3] in the National Labor Relations Act[4] (NLRA) and the challenges of organizing a transient workforce[5] in a "fissured" workplace,[6] the movement has turned to state employment law to protect workers.[7] Recently, in California, the Fight for $15 movement achieved its latest victory — the Fast Food Accountability and Standards Recovery Act[8] (FAST Act), which creates a Fast Food Council of state-appointed employer, employee, and government representatives to set minimum wages and employment standards for the fast-food industry.[9] The Act is a bold attempt at participatory democracy, but its design opens it up to preemption-based challenges. Far from being preempted, however, the FAST Act should serve as a model for local legislation to protect workers' rights.

AB 257 was originally introduced by Assemblymember Lorena Gonzalez in January 2021 but failed on the Assembly floor by three

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[1] *See About Us*, FIGHT FOR $15, https://fightfor15.org/about-us [https://perma.cc/QU63-W65Z].

[2] *See id.*; Dominic Rushe, *"Hopefully It Makes History": Fight for $15 Closes in on Mighty Win for US Workers*, THE GUARDIAN (Feb. 13, 2021, 5:00 AM), https://www.theguardian.com/us-news/2021/feb/13/fight-for-15-minimum-wage-workers-labor-rights [https://perma.cc/BV62-35P3]; Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 51 (2016).

[3] Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2686 (2008) ("[M]ost scholars believe that the NLRA is a failed regime." *Id.* at 2685–86.).

[4] 29 U.S.C. §§ 151–169.

[5] Lela Nargi, *An Inside Look at Union Organizing in the Fast Food Industry*, CIV. EATS (Dec. 7, 2021), https://civileats.com/2021/12/07/an-inside-look-at-union-organizing-in-the-fast-food-industry [https://perma.cc/PX4D-VQLN].

[6] Andrias, *supra* note 2, at 61. Even if unionizing is successful, since many fast-food workers work at franchises, joint-employment rules make it next to impossible to bring fast-food companies to the bargaining table. *See* Eric Morath, *Labor Rule Impedes Fast-Food, Contract Workers' Ability to Unionize*, WALL ST. J. (Feb. 25, 2020, 12:15 PM), https://www.wsj.com/articles/labor-rule-impedes-fast-food-contract-workers-ability-to-unionize-11582638300 [https://perma.cc/5629-EF6Q].

[7] Of the more than eight-and-a-half million food-service workers in the United States, only 1.7% are represented by unions, the lowest rate of any industry in the country. Economic News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Table 3. Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry (Jan. 19, 2023), https://www.bls.gov/news.release/union2.t03.htm [https://perma.cc/TRH9-KEFC].

[8] Assemb. B. 257, 2021–2022 Leg., Reg. Sess. (Cal. 2022) (enacted) (codified at CAL. LAB. CODE §§ 96, 1470–1473 (West 2020 & Supp. 2023)).

[9] LAB. § 1471(b).

votes in June 2021.[10] An amended version of the bill was reintroduced in January 2022, and, after further amendments, the bill passed by a bare majority in the Senate.[11] After passing the Assembly, the bill was signed into law by Governor Gavin Newsom on September 5, 2022.[12] The Act is the result of collective action by fast-food workers across California who filed hundreds of health, safety, and wage complaints during the COVID-19 pandemic and went on strike to demand better conditions and passage of the bill.[13] The legislative findings describe the "abuse, low pay, few benefits, and minimal job security" of fast-food workers; the prevalence of "wage theft, sexual harassment and discrimination"; and the industry's "heightened health and safety risks,"[14] which were exacerbated by the pandemic.[15] Accordingly, the purposes of the Council are "to establish sectorwide minimum standards on wages, working hours, and other working conditions adequate to ensure and maintain the health, safety, and welfare of, and to supply the necessary cost of proper living to, fast food restaurant workers," as well as to coordinate state agency responses to those issues.[16]

The Council is composed of ten members: one representative each of the Department of Industrial Relations and the Governor's Office of Business and Economic Development, two of fast-food franchisors, two of franchisees, two of employees, and two of advocates for employees.[17]

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[10] *Bill Votes, AB-257 Food Facilities and Employment*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=202120220AB257 [https://perma.cc/HY6X-TXDD] (to see information about the bill as originally introduced, select "01/15/21 - Introduced" from the "Version" dropdown menu at the top right of the page, then click the "Status" tab).

[11] *Id.* The amended version of the bill capped the minimum wage at $22, reduced the number of government representatives on the Council, and removed franchisor joint liability for labor law violations made by franchisees. Jaimie Ding & Suhauna Hussain, *California Legislature Passes Bill to Protect Fast-Food Workers*, L.A. TIMES (Aug. 29, 2022, 7:38 PM), https://www.latimes.com/business/story/2022-08-29/california-senate-pass-bill-fast-food-workers [https://perma.cc/YF2R-Y7R2].

[12] Press Release, Off. of Governor Gavin Newsom, Governor Newsom Signs Legislation to Improve Working Conditions and Wages for Fast-Food Workers (Sept. 5, 2022), https://www.gov.ca.gov/2022/09/05/governor-newsom-signs-legislation-to-improve-working-conditions-and-wages-for-fast-food-workers [https://perma.cc/TX8P-DVXJ].

[13] Press Release, Fight for $15, On Labor Day, Gov. Newsom Signs Landmark Bill to Give Voice to More than Half Million Fast-Food Workers (Sept. 5, 2022), https://fightfor15.org/on-labor-day-gov-newsom-signs-landmark-bill-to-give-voice-to-more-than-half-million-fast-food-workers [https://perma.cc/5X4C-GD4L].

[14] Assemb. B. 257 § 2(a), 2021–2022 Leg., Reg. Sess. (Cal. 2022) (enacted).

[15] "Numerous complaints" filed by workers showed employers "routinely . . . flouted protections." *Id.* § 2(f). The legislature found the health and safety risks to workers and the public "serious and unacceptable," *id.* § 2(g), and noted that companies "profited during the pandemic" while their workers remained unable to participate in a "more equitable economy," *id.* § 2(h).

[16] CAL. LAB. CODE § 1471(b) (West Supp. 2023). In addition to wages and workplace safety, working conditions also include "the right to take time off work for protected purposes, and the right to be free from discrimination and harassment in the workplace." *Id.* § 1470(h). The Council cannot set standards for paid time off or predictable scheduling but may make a recommendation to the legislature to enact laws regarding the former. *Id.* § 1471(d)(2)(B)(7)–(8).

[17] *Id.* § 1471(a)(1). The Speaker of the Assembly and the Senate Rules Committee each appoint one representative of employee advocates; the Governor appoints all other members. *Id.* § 1471(a)(2).

Its standards cover all workers employed by a restaurant that is part of a fast-food chain, meaning it has one hundred or more establishments nationwide that share a common brand or standardized services.[18] The Council may set a minimum wage as high as $22 in 2023, with that cap increasing at a set rate each year.[19] The Council must conduct a full review of minimum standards at least once every three years,[20] and it must hold public meetings no less than once every six months in metropolitan areas across the state where fast-food workers and the public will have the opportunity to be heard on issues of industry conditions.[21]

Once the Director of Industrial Relations receives "a petition approving the creation of the council signed by at least 10,000 California fast food restaurant employees,"[22] the Council shall promulgate these minimum standards, decided by majority vote, and submit them to the labor committees of the legislature by January 15.[23] The standards take effect October 15 of that year at the earliest, but the legislature may pass legislation to prevent them from going into effect.[24] The Council is empowered to direct and coordinate with the Governor and government agencies,[25] and where its standards conflict with any existing regulations, the Council's standards apply.[26] The Act makes an exception for standards in collective bargaining agreements that provide better protection than a conflicting Council-promulgated standard.[27] Failure to abide by these standards is unlawful, and compliance is enforced by the Labor Commissioner and Division of Labor Standards Enforcement pursuant to their enforcement procedures as well as any which the Council may promulgate.[28] The Council will cease operations

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18 *Id.* § 1470(a).

19 *Id.* § 1471(d)(2)(B).

20 *Id.* § 1471(f). The Council is constrained by a one-way ratchet: any new regulation cannot be less protective or beneficial than the one it replaces. *Id.*

21 *Id.* § 1471(g). In cities or counties of more than 200,000 people, the Act allows for the establishment of "Local Fast Food Councils" — composed of at least one fast-food franchisor or franchisee, one fast-food worker, and a majority of representatives from relevant local agencies — which also host public meetings and may provide the Council with recommendations. *Id.* § 1471(i).

22 *Id.* § 1471(c)(2).

23 *Id.* § 1471(d)(1)(A)–(B).

24 *Id.* § 1471(d)(1)(B).

25 *Id.* § 1471(c)(1).

26 *Id.* § 1471(d)(1)(A). Where contemplated standards fall within the jurisdiction of the Occupational Safety and Health Standards Board, however, the Council is not authorized to promulgate those standards but shall petition the Board to adopt them. *Id.* § 1471(e). The Board must respond within six months, or three months in an emergency. *Id.*

27 *Id.* § 1471(k)(3). The collective bargaining agreement's standard applies so long as the agreement provides "a regular hourly rate of pay not less than 30 percent more than the state minimum wage for those employees, . . . [it] provides equivalent or greater protection than the standards established by the council," and state law on the issue authorizes such an exception. *Id.*

28 *Id.* § 1471(k)(1). The Commissioner can investigate an alleged violation, order temporary relief by issuing a citation, and initiate a civil action for which a court may grant injunctive relief. *Id.* § 1471(k)(2). The Act also protects workers from employer retaliation for whistleblowing, testifying before any council, or refusing to work based on a serious safety concern, providing the worker with a right of action and entitling them to reinstatement and treble damages. *Id.* § 1472(a)–(b).

on January 1, 2029.[29]

The FAST Act is an important attempt to create a participatory legislative structure to protect workers within the NLRA regime. Where federal labor law has failed an entire industry, California has stepped in to create a political structure that is responsive to workers' needs. In many ways, this approach is nothing new: state legislatures, including the California Assembly, often delegate quasi-legislative authority to expert boards;[30] and wage councils proliferated in the Progressive and New Deal Eras.[31] But one likely challenge to the Act is rooted in an unlikely source: the NLRA itself. While the NLRA grants workers the affirmative right to unionize and bargain collectively, it also preempts any state and local legislation attempting to regulate the same.[32] But any preemption challenges to the Act should fail. State minimum labor standards are not preempted by the NLRA, and the Council's structure does not displace the NLRA's private collective bargaining regime. Instead, states and municipalities should look to the FAST Act's structure as an effective way to protect workers through employment legislation, especially in industries where unionizing is untenable.

Though nothing in the NLRA expressly states that it preempts state legislation, a series of Supreme Court decisions has elaborated a broad implicit preemption regime that rivals that of most other federal statutes.[33] In its landmark 1959 decision *San Diego Building Trades Council v. Garmon*,[34] the Court held that if an activity is "arguably" protected or prohibited by the NLRA, states do not have jurisdiction to regulate that activity because allowing them to do so "involves too great a danger of conflict with national labor policy."[35] The Court elaborated a separate and even more expansive preemption regime in *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission*,[36] holding that an activity can be "protected"[37] under the NLRA where Congress intended it to be left unregulated as a "permissible 'economic

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[29] *Id.* § 1471(m). If the Council is inoperative on that date, the minimum wage for fast-food workers will continue to increase annually at a set rate. *Id.* § 1473.

[30] Catherine L. Fisk & Amy W. Reavis, *Protecting Franchisees and Workers in Fast Food Work*, AM. CONST. SOC'Y (Dec. 2021), https://www.acslaw.org/wp-content/uploads/2021/12/Fisk-Reavis-IB-Final5662.pdf [https://perma.cc/4NXM-QLTE].

[31] *See* Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 650–53 (2019) ("By 1938, twenty-five states had some form of minimum wage law. . . . [N]early all of these early wage-and-hour statutes used some form of industry committee . . . ." *Id.* at 652.); *id.* at 667–69 (describing the Fair Labor Standards Act's tripartite industry committees that set wages by industry).

[32] Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1154–55 (2011).

[33] *See id.* at 1154.

[34] 359 U.S. 236 (1959).

[35] *Id.* at 245–46.

[36] 427 U.S. 132 (1976).

[37] *Id.* at 141 (quoting NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 492 (1960)).

weapon[]'" wielded by parties in the collective bargaining process.[38] In addition to "arguably" protected activities, activities intended to be "controlled by the free play of economic forces" are also preempted.[39] Any local attempt to regulate those activities enters into the "substantive aspects of the bargaining process" and is thus preempted.[40] Under *Machinists*, the "crucial inquiry" is whether the local regulation at issue "would frustrate effective implementation of the Act's processes."[41] However, because "[t]he NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms" reached through that process,[42] "state laws of general application" that set minimum standards of employment — like the FAST Act — are not preempted so long as they do not interfere with the NLRA's collective bargaining process.[43]

But the FAST Act's ambitious design could face an equally ambitious challenge under *Machinists*. The argument might go something like this: by creating a forum for labor and management to negotiate binding employment standards, the Act replaces the NLRA's collective bargaining regime with its own alternative bargaining process to effectively define all "the substantive aspects of the bargaining process" for the fast-food industry.[44] With employer and employee representatives deciding on comprehensive industry standards, the Act's challengers will argue that the Council does not simply "form a 'backdrop'" against which fast-food "employers and employees come to the bargaining table."[45] Rather, they will argue, it forms the bargaining table itself.[46]

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[38] *Id.* (quoting *Ins. Agents' Int'l Union*, 361 U.S. at 489).

[39] *Id.* at 140 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)); *see also id.* at 150.

[40] *Id.* at 149–51 (quoting *Ins. Agents' Int'l Union*, 361 U.S. at 498).

[41] *Id.* at 147–48 (quoting Bhd. of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 380 (1969)).

[42] Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 753 (1985); *see also id.* at 754.

[43] *See id.* at 753–54 ("The evil Congress was addressing thus was entirely unrelated to local or federal regulation establishing minimum terms of employment." *Id.* at 754.).

[44] *Machinists*, 427 U.S. at 149 (quoting *Ins. Agents' Int'l Union*, 361 U.S. at 498).

[45] Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21 (1987) (quoting *Metro. Life*, 471 U.S. at 757).

[46] Indeed, fast-food-industry attorneys are already suggesting these arguments as potential challenges to the Act. *See, e.g.*, Riley Lagesen et al., *How the NLRA May Slow Down the FAST Act*, GREENBERG TRAURIG LLP (Oct. 14, 2022), https://www.gtlaw.com/en/insights/2022/10/published-articles/how-the-nlra-may-slow-down-the-fast-act [https://perma.cc/Q6MX-BHK4] ("By requiring another form of collective bargaining, the FAST Act may face challenges arguing that it interferes with or is preempted by federal law under the National Labor Relations Act."). And because the bargaining table is such a familiar labor paradigm, even the Act's proponents have used that language when referring to the Council. Service Employees International Union president Mary Kay Henry told Bloomberg News that "the bill effectively offers 'another form of collective bargaining' for fast food workers." Josh Eidelson, *California Moves to Give Fast Food Workers More Power, Heeding "Fight for $15*," BLOOMBERG NEWS (Aug. 29, 2022, 6:12 PM), https://www.bloomberg.com/news/articles/2022-08-29/california-moves-to-give-fast-food-workers-say-in-regulations [https://perma.cc/ENV7-ZLHA]. Union leaders might be forgiven for using collective bargaining language more abstractly to describe how the Act amplifies workers' political voices in setting employment standards, but the phrase is legally inapt.

Situating this atmospheric argument within the governing doctrine, two distinct preemption challenges emerge, both of which prove unavailing. The first is to the Act's substantive standards. Challengers are likely to argue that the Council's broad mandate to set industry-specific standards effectively defines the terms of fast-food employment contracts and thus interferes with the collective bargaining process. This idea has not been directly addressed by the Supreme Court, but it has received attention from the Ninth Circuit, whose precedent would likely control any challenge to the Act. In *Chamber of Commerce of the United States v. Bragdon*,[47] the Ninth Circuit found that the NLRA preempted a Costa County ordinance requiring employers in certain private industrial construction projects to pay a prevailing wage set by reference to industry collective bargaining agreements.[48] The panel based its holding on the fact that the ordinance applied only to "particular workers in a particular industry and [was] developed and revised from the bargaining of others."[49] In dicta, it went further, stating that "in the extreme, the substantive requirements could be so restrictive as to virtually dictate the results of the contract," thus interfering with the "free-play of economic forces" in the bargaining process.[50] In subsequent decisions, however, the Ninth Circuit has "made a significant retreat" from *Bragdon*, "effectively revers[ing]" its holding with respect to single industry standards[51] and limiting its application to "extreme situations."[52]

Even applying *Bragdon*'s dicta, nothing about the Act is "extreme." In *Bragdon*, the law at issue set a prevailing wage based on other collective bargaining agreements, forcing the employer to pay that wage rate whether it entered into an agreement or not — effectively "eviscerat[ing] the purpose of collective bargaining negotiations."[53] In contrast, the Council can set only a traditional minimum wage, capped by numbers hardcoded into the Act by the legislature.[54] The Council's

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[47] 64 F.3d 497 (9th Cir. 1995).

[48] *Id.* at 498–99, 504.

[49] *Id.* at 504.

[50] *Id.* at 501 (quoting Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp. Rels. Comm'n, 427 U.S. 132, 140 (1976)).

[51] Fortuna Enters., L.P. v. City of Los Angeles, 673 F. Supp. 2d 1000, 1010–11 (C.D. Cal. 2008) (citing Associated Builders & Contractors of S. Cal., Inc. v. Nunn, 356 F.3d 979, 990 (9th Cir. 2004)); *see Nunn*, 356 F.3d at 990 (citing Dillingham Constr. N.A., Inc. v. County of Sonoma, 190 F.3d 1034, 1034 (9th Cir. 1999); Nat'l. Broad. Co. v. Bradshaw, 70 F.3d 69, 71–73 (9th Cir. 1995); Viceroy Gold Corp. v. Aubry, 75 F.3d 482 (9th Cir. 1996)) ("It is now clear in this Circuit that state substantive labor standards, including minimum wages, are not invalid simply because they apply to particular trades, professions, or job classifications rather than to the entire labor market.").

[52] *Nunn*, 356 F.3d at 990.

[53] *Fortuna Enters.*, 673 F. Supp. 2d at 1009 (discussing *Bragdon*, 64 F.3d at 502–04).

[54] *See* CAL. LAB. CODE § 1471(d)(2)(B) (West Supp. 2023); *see also Bragdon*, 64 F.3d at 502 (finding ordinance preempted because its "specific minimum wage and benefits" for "specific construction projects" derived from collective bargaining agreements "affect[] the bargaining process in a much more invasive and detailed fashion" than "a minimum wage law, applicable to all employees, guarantying a minimum hourly rate.").

ability to set other minimum employment standards is constrained as well: the Act expressly prohibits regulation of paid time off or work scheduling, and the Council's mandate is limited to "wages, working hours, and other working conditions *adequate to ensure and maintain the health, safety, and welfare* of . . . fast food restaurant workers."[55] The Council's standards do not intrude into private collective bargaining at all — in fact, the Act explicitly provides an *exception* for collective bargaining agreements.[56] Moreover, other courts have upheld far more "extreme" regulations like for-cause protection,[57] including at the industry level,[58] most recently for fast-food workers in New York City.[59] Like any minimum standards, the Council's regulations simply set a backdrop for, but do not "dictate the results of,"[60] collective bargaining.

The second preemption challenge concerns the Council's structure. To start, the Supreme Court in *Chamber of Commerce of the United States v. Brown*[61] stated that "[i]n NLRA pre-emption cases, 'judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted.'"[62] Because states can set minimum employment standards, it should be irrelevant whether those standards are set through legislation, a wage board, or a fast-food council.[63] In the eyes of its challengers, however, the FAST Act creates a separate forum for sector-wide bargaining, infringing not only on a single economic weapon but on the entirety of "economic forces" of the collective bargaining regime.[64]

But that argument falls flat. The Council's structure is not novel: the Progressive Era saw over a dozen states establish commissions to set industry wages and standards, including California's own Industrial Welfare Commission (IWC), a tripartite board consisting of employer, worker, and state representatives.[65] In 2015, Fight for $15 pressured New York State into creating a tripartite wage board that raised the

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[55] LAB. § 1471(b) (emphasis added).

[56] *Id.* § 1471(k)(3); *see* Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 22 (1987) ("If a statute that permits *no* collective bargaining on a subject escapes NLRA pre-emption, surely one that permits such bargaining cannot be pre-empted." (citation omitted)).

[57] *See, e.g.*, St. Thomas–St. John Hotel & Tourism Ass'n v. U.S. Virgin Islands, 218 F.3d 232, 246 (3d Cir. 2000).

[58] *See* R.I. Hosp. Ass'n v. City of Providence *ex rel.* Lombardi, 667 F.3d 17, 33 (1st Cir. 2011).

[59] Rest. L. Ctr. v. City of New York, 585 F. Supp. 3d 366, 372–74 (S.D.N.Y. 2022).

[60] Chamber of Com. of the U.S. v. Bragdon, 64 F.3d 497, 501 (9th Cir. 1995).

[61] 554 U.S. 60 (2008).

[62] *Id.* at 69 (quoting Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 614 n.5 (1986)).

[63] *Cf. id.* ("California plainly could not directly regulate noncoercive speech about unionization by means of an express prohibition. It is equally clear that California may not indirectly regulate such conduct by imposing spending restrictions on the use of state funds.").

[64] *See* Andrias, *supra* note 2, at 91; Lagesen et al., *supra* note 46.

[65] Nelson Lichtenstein, *Sectoral Bargaining in the United States: Historical Roots of a Twenty-First Century Renewal*, *in* THE CAMBRIDGE HANDBOOK OF LABOR AND DEMOCRACY 87, 88–90 (Angela B. Cornell & Mark Barenberg eds., 2022). The IWC is "currently inoperative." *Id.* at 90.

minimum wage to $15 for fast-food workers.[66] Like these boards, the Council is a creature of old-fashioned political, not workplace, democracy. Employer and employee representatives are chosen by elected officials, and where there is any disagreement, government representatives have tiebreaking votes.[67] The legislature retains full control over whether these standards become law and can pass legislation to prevent them from taking effect. Moreover, there is no "bargaining" at all: there are no "economic weapons" to be wielded in a two-sided adversarial battle, only multi-party political deliberations. The table is round, not square. Though it may expand democratic participation, the Act does not provide an alternative avenue for workplace organization, self-determination, or collective bargaining, such that it might undermine those processes in the NLRA — the crucial inquiry in *Machinists*.

In both substance and form, the FAST Act sits squarely outside the bounds of NLRA preemption. When the NLRA established a regime of private collective bargaining, it did not mean to foreclose public policy as a recourse for workers to seek greater protection.[68] What is at stake here is greater than employment terms — it is how democracy itself can be leveraged to protect workers. Where "ossified" federal labor law provides no help in practically un-unionizable workplaces,[69] the FAST Act forms part of a growing trend of local legislation that expands workplace protections by involving workers in the political process.[70] The Act's fate will ultimately be decided by referendum vote after fast-food companies poured over $13 million into a signature-gathering campaign to place the law on the ballot in 2024.[71] Whatever the result, fast-food workers have made clear that they demand a change. Whether it's for a union, a living wage, or better working conditions, the fight continues.

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[66] Andrias, *supra* note 2, at 64–66.

[67] *See* CAL. LAB. CODE § 1471(a)(2) (West Supp. 2023); *see id.* § 1471(d)(1)(A) ("Decisions by the council . . . shall be made by an affirmative vote of at least six . . . members.").

[68] *See* Concerned Home Care Providers, Inc. v. Cuomo, 783 F.3d 77, 87 (2d Cir. 2015) ("*Machinists* preemption is not a license for courts to close political routes to workplace protections simply because those protections may also be the subject of collective bargaining." (citing Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21–22 (1987))).

[69] *See generally* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

[70] Aurelia Glass & David Madland, *Worker Boards Across the Country Are Empowering Workers and Implementing Workforce Standards Across Industries*, CTR. FOR AM. PROGRESS (Feb. 18, 2022), https://www.americanprogress.org/article/worker-boards-across-the-country-are-empowering-workers-and-implementing-workforce-standards-across-industries [https://perma.cc/4CT2-BLTM] (discussing growth of tripartite boards in four states and three cities since 2018). These are examples of what Professor Kate Andrias has called "social bargaining," Andrias, *supra* note 2, at 8, and Professor Cynthia Estlund has called "sectoral co-regulation," Cynthia L. Estlund, Sectoral Solutions that Work: The Case for Sectoral Co-regulation 2–4 (Nov. 23, 2022) (unpublished manuscript) (on file with the Harvard Law School Library), a promising alternative model for building worker power in the new economy.

[71] Aneurin Canham-Clyne, *FAST Recovery Act Referendum Approved, Opening Political Duel in California*, REST. DIVE (Jan. 25, 2023), https://www.restaurantdive.com/news/fast-recovery-act-referendum-opens-political-duel-in-california/641196 [https://perma.cc/XGY6-VSAD].

Applicant Details

First Name	**Nia**
Last Name	**Coleman**
Citizenship Status	**U. S. Citizen**
Email Address	**nia.coleman@temple.edu**
Address	**Address** **Street** **440 Valley Road** **City** **Elkins Park** **State/Territory** **Pennsylvania** **Zip** **19027** **Country** **United States**
Contact Phone Number	**2679829187**

Applicant Education

BA/BS From	**Millersville University of Pennsylvania**
Date of BA/BS	**December 2018**
JD/LLB From	**Temple University--James E. Beasley School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=23905&yr=2011**
Date of JD/LLB	**May 25, 2024**
Class Rank	**Not yet ranked**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Shellenberger, James
jshell@temple.edu
Sanita, Victoria
vsanita@philadefender.org
Art, Haywood
Dwight.Lewis@pasenate.com
Austin, Cheryl
Judge.Cheryl@montgomerycountypa.gov
Levy, Mary
lcareer@temple.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Nia Coleman
440 Valley Road, Melrose Park PA 19027
nia.coleman@temple.edu | (267) 982-9187

Hon. Juan R. Sánchez
United States District Court
Eastern District of Pennsylvania
601 Market Street
Philadelphia, Pennsylvania 19106

Honorable Chief Sánchez:

I am writing to apply for a 2024-2025 clerkship with your chambers. I am currently a 4LE at the Temple University Beasley School of Law. I am interested in this position because I enjoy legal research and am looking to further develop my skills while also absorbing the law.

As a 4LE in my final year of law school, I am immensely proud of my achievements as a student. I would make a meaningful addition to your chambers. I have cultivated strong written and oral communication skills through Temple as a part-time student and the Defender Association of Philadelphia as a full-time employee. Through Temple I had the privilege of analyzing, researching, writing, and arguing a criminal appellate case file from beginning to end; I collaborated with the Innocence Project to create a research project focused on the defense attorney's role in wrongful convictions; and I trained with the law school librarians on advanced research methods and technologies. Through the Defender, I am responsible for creating literature for my clients, co-workers, and interested criminal justice partners. These experiences developed a strong analytical technique, work ethic, and sophistication for which I was recognized through various scholarships, awards, promotions, and other academic achievements. I would like to go further in my skill and knowledge, however – this clerkship will take me there.

I am also looking to give back, but not in the traditional sense. I want to lead. A leader is not always out at the forefront. A leader shows grace in an otherwise ungraceful situation or shows, rather than tells, what is expected of excellence. I aspire for the way I carry myself and for the opportunities that I pursue to inspire those who come behind me to go further than I ever could.

I have enclosed my resume, unofficial transcript, and writing sample if there are further questions about my qualifications. Please do not hesitate to contact me for additional information. Thank you for your time. I hope to hear from you soon.

Respectfully,

Nia Coleman

Nia S. Coleman

nia.coleman@temple.edu | (267) 982-9187
Montgomery County, Pennsylvania

EDUCATION

Temple University Beasley School of Law — J.D. expected May 2024
Philadelphia, Pennsylvania — Evening Division
Transfer Student – Fall 2021

GPA: 3.37/4.0

Honors: Fall 2022 Dean's List
2023 Barristers' Scholarship Recipient

Member: Student Bar Association
Black Law Student Association
Student Ambassador – PHL Bar Association

Widener University Delaware Law School — Fall 2020 – Summer 2021
Wilmington, Delaware — Evening Division

GPA: 3.47/4.0

Honors: Ranked Top 10%
Fall 2020 Dean's List
Certificate of Achievement – Legal Methods II

Member: Student Bar Association
Black Law Student Association

Millersville University of Pennsylvania — B.A. awarded in December 2018
Millersville, Pennsylvania

Major: Government and Political Affairs

Minor: Criminology

Activities:

Artists Rocking Together Treasurer	2016 – 2017
Millersville Concerned Women Board Member	2017 – 2018
Black Student Union Member	2015 – 2018

LEGAL INTERNSHIPS

Juanita Kidd Stout Center for Criminal Justice – Courtroom Operations — Summer 2018
Philadelphia, Pennsylvania

Legal Intern: Organized jury pools for selection processes;
Aided the Court in maintaining order while in session;
Observed various criminal trials; and
Scheduled judicial agendas, as requested.

Montgomery County Court of Common Pleas – Orphan's Court — Summer 2017
Norristown, Pennsylvania

Judicial Intern: Provided judicial support to Hon. Cheryl L. Austin;

Comprehensively summarized petitions submitted to the Court;
Researched relevant Pennsylvania law to determine the legal basis for judicial opinions;
Approached to provide an analytical, contemporary perspective on matters before the Court; and
Gained competency in legal jargon and procedure.

FULL-TIME EMPLOYMENT

Defender Association of Philadelphia – Adult Social Services July 2021 – present
Philadelphia, Pennsylvania

Forensic Intensive Recovery (FIR) Director: Liaison between the Defender and various community partners;
Attend high-level monthly meetings with area justice partners;
Create literature for client, co-worker, and criminal justice partner dissemination;
Collaborate with community partners to provide treatment for indigent clients;
Refer addicted clients to appropriate treatment facilities;
Supervise and support the administrative staff in the unit;
Complete various supervisory tasks including training, delegation of work, monthly supervisory meetings; and
Direct bi-weekly meetings to review treatment referrals from office attorneys

Defender Association of Philadelphia – Adult Social Services February 2019 – July 2021
Philadelphia, Pennsylvania

File Clerk: Clinically evaluated confidential client summaries to present to supervisors for treatment plans;
Respectfully challenged opposing ideologies in order to produce better client outcomes;
Praised for initiating new procedures that streamlined client transportation to court-ordered programs;
Maintained 2,000+ files, file room;
Regularly examined and distributed important legal documents relating to client dispositions; and
Recorded notes for weekly meetings; Support staff for unit Social Workers

INTERESTS

Baking
Cosmetology
Film Production
Fitness

COMMUNITY SERVICE

Chosen 300 Ministry Homeless Feeding Program Volunteer March 2012 – September 2022

Montgomery County Youth Aid Panel Member July 2021 – February 2023

SKILLS

Advanced Legal Research
Communication and Correspondence Prowess
Construct Infographics
CPCMS and E-File Experience
Identify and Analyze Political Trends
LexisNexus and WestLaw Proficiency
Microsoft Office Suite

Nia S. Coleman

Student Academic Transcript

Academic Transcript

Transcript Level

Law

Transcript Type

Advising Transcript

Student Information | Transfer Credit | Institution Credit | Transcript Totals | Course(s) in Progress

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Student Information

Name
Nia S. Coleman

Student Type
Continuing Degree Seeking

Curriculum Information

Current Program : Juris Doctor

Program	College	Campus
Law--Part Time	Law, Beasley School	Main

Major and Department

Law--Part Time,
Law: Beasley
School of Law

Transfer Credit Accepted by Institution

202136 : Widener Univ-Delaware Campus

Subject	Course	Title	Grade	Credit hours	Quality points	R
JUDO	0410	Criminal Law I	CR	3.000	0.00	
JUDO	0412	Property II	CR	2.500	0.00	
JUDO	0412	Torts II	CR	2.000	0.00	
JUDO	0412	Applied Learning Law	CR	1.000	0.00	
JUDO	0412	Professional Responsibility	CR	3.000	0.00	
JUDO	0414	Legal Research & Writing II	CR	2.500	0.00	
JUDO	0414	Legal Research & Writing	CR	3.000	0.00	
JUDO	0418	Property	CR	4.000	0.00	
JUDO	0420	Torts	CR	4.000	0.00	
JUDO	0633	First Amendment	CR	2.000	0.00	

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	27.000	27.000	27.000	0.000	0.00	0.00

Institution Credit

Term : 2021 Fall

College
Law, Beasley School

Major
Law--Part Time

Student Type
First Time Professional

Term Comments
Semester Notations:

DCP (Civil Procedure I)

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours
JUDO	0402	Main	LW	Civil Procedure I Levy, M	B	4.000	12.00		
JUDO	0406	Main	LW	Contracts Anderson, M	B	4.000	12.00		

Term Totals	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Current Term	8.000	8.000	8.000	8.000	24.00	3.00
Cumulative	8.000	8.000	8.000	8.000	24.00	3.00

Term : 2022 Spring

College
Law, Beasley School

Major
Law--Part Time

Student Type
First Time Professional

Academic Standing
Not Calculated

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours
JUDO	0503	Main	LW	Criminal Appellate Procedure	A-	2.000	7.34		

				Epstein, J			
JUDO	0568	Main	LW	Family Law Culhane, J	B	3.000	9.00
JUDO	5044	Main	LW	Advanced Legal Research Randolph, J	B	2.000	6.00

Term Totals	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Current Term	7.000	7.000	7.000	7.000	22.34	3.19
Cumulative	15.000	15.000	15.000	15.000	46.34	3.09

Term : 2022 Summer I

College

Law, Beasley School

Major

Law--Part Time

Student Type

First Time Professional

Academic Standing

Not Calculated

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours
JUDO	1015	Main	LW	LRW III Civil Motions Practice Levy, M	A	3.000	12.00		

Term Totals	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Current Term	3.000	3.000	3.000	3.000	12.00	4.00
Cumulative	18.000	18.000	18.000	18.000	58.34	3.24

Term : 2022 Fall

College
Law, Beasley School

Major
Law--Part Time

Student Type
Continuing Degree Seeking

Additional Standing
Dean's List

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours
JUDO	0404	Main	LW	Constitutional Law Little, L	B+	4.000	13.32		
JUDO	0532	Main	LW	Criminal Procedure I Marcus, A	A-	3.000	11.01		
JUDO	1027	Main	LW	Innocence and Wrongful Conv Boyers-Bluestine, M	A	3.000	12.00		

Term Totals	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Current Term	10.000	10.000	10.000	10.000	36.33	3.63
Cumulative	28.000	28.000	28.000	28.000	94.67	3.38

Term : 2023 Spring

College
Law, Beasley School

Major
Law--Part Time

Student Type
Continuing Degree Seeking

Academic Standing
Not Calculated

Last Academic Standing
Not Calculated

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R	CEU Contact Hours
JUDO	0445	Main	LW	Family Law: Custody Echenhofer, S	B+	2.000	6.66		
JUDO	0601	Main	LW	Sports Law Jacobsen, K	B-	3.000	8.01		
				Federal Criminal					

JUDO	0647	Main	LW	Law Shellenberger, J	A-	3.000	11.01
JUDO	1080	Main	LW	Legal Research Writing III Dean, B	A-	3.000	11.01

Term Totals	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Current Term	11.000	11.000	11.000	11.000	36.69	3.34
Cumulative	39.000	39.000	39.000	39.000	131.36	3.37

Transcript Totals

Transcript Totals - (Law)	Attempt Hours	Passed Hours	CEU Hours	GPA Hours	Quality Points	GPA
Total Institution	39.000	39.000	39.000	39.000	131.36	3.37
Total Transfer	27.000	27.000	27.000	0.000	0.00	0.00
Overall	66.000	66.000	66.000	39.00	131.36	3.37

Course(s) in Progress

Term : 2023 Summer I

College

Law, Beasley School

Major

Law--Part Time

Student Type

Continuing Degree Seeking

Subject	Course	Campus	Level	Title	Credit Hours
JUDO	1030	Main	LW	Forensic Evidence, Science, and Medicine	3.000

Term : 2023 Fall

College	Major	Student Type
Law, Beasley School	Law--Part Time	Continuing Degree Seeking

Subject	Course	Campus	Level	Title	Credit Hours
JUDO	0975	Main	LW	Death Penalty	3.000
JUDO	1039	Main	LW	Race and the Law	3.000
JUDO	D460	Main	LW	ITAP Section	5.000

June 30, 2023

Regarding Nia Coleman:

Dear Hiring Panel,

It is with great enjoyment that I send you with a letter in support of Nia Coleman's application for law clerk assignment. Nia has worked as the FIR Director here at the Defender Association of Philadelphia since February 2019.

I have known Ms. Coleman since her start in 2019 and have been her supervisor since March of 2022. Having Ms. Coleman as an essential director has been a godsend. Ms. Coleman has a multitude of duties in the office. First, she supervises all the administrative staff. They all directly report to her. She is well respected by them and equitable and with their assignments. She is fair in her evaluations and discipline. In addition, she facilitates and maintains many databases for the Adult Social Services Unit which are necessary to show statistics in order to obtain funding. While doing all this she also oversees the FIR (Forensic Intensive Recovery) portion of social services. This requires tracking of all clients who have been referred to FIR for drug treatment assessments and following up on the outcome of their evaluations. Once the evaluations are complete Ms. Coleman must then make sure the report is uploaded into the system and then monitored to make sure the client's legal issues allows them to be released there. Once available Nia makes sure the clients are transported to their programs from the prison. All this requires massive organizational abilities. If that was not enough, she assists in managing interns which we receive from various schools and educational levels. She is amazing at organization and really takes the interns under her wing. Nia creates a training agenda for them and a daily schedule of their assignments. Nia also is very familiar with all the treatment resources we have and, in a pinch, fills in for social workers referring clients to programs. I cannot express her level of eagerness and motivation to work hard and complete her assignments well. Ms. Coleman's work product is always finished correctly and in a timely manner. She is so effective at her job that she, most days, helps her staff and other staff when they are overwhelmed by their assignments. Nia has also attended court on occasion with some clients and has earned the respect of judges and attorneys. Her eagerness and intelligence really shine when she does any task asked of her even when it is outside her regular job description. She never says "no" but just performs the task at hand.

Ms. Coleman also has the unique ability to change gears mid-stride and adapt to a changing environment. She is tenacious when given an assignment. Nia has the ability to anticipate needs within the unit to the point that when I go in to her and suggest a report or memo, she already has it prepared. Her writing abilities are outstanding and her ability to just crank out work is amazing and even more so since she is also going to law school at night.

Ms. Coleman's working-class background has taught her humility and empathy for people. She handles difficult clients with the care that she herself would want to be treated as a stranger trying to navigate a difficult system. Many defendants can be difficult as a result of their many social and economic issues. Ms. Coleman has the sensibility and empathy to treat them as the

people they are - not just a cog in the system. I have seen her on several occasions calm irate clients by calmly answering their questions and treating them in a caring manner. This is an ability which will go a long way for her as an attorney dealing with difficult clients.

I cannot say enough about Nia. She has a wonderful personality, is creative, and determined. I genuinely believe that Ms. Coleman will make an excellent law clerk and lawyer. She has my highest recommendation. Ms. Coleman has shown her tenacity, great work ethic, and integrity over the several years she has worked with me. These qualities are such that any judge would be proud have her in their midst.

Victoria L. Sanita, Esq.

Victoria L. Sanita, Esq.
Director of Interdosciplinary Social Services
Defender Association of Philadelphia
1441 Sansom St.
Philadelphia, PA 19102
267-765-6724

June 16, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is my great pleasure to recommend Nia Coleman for a clerkship with your chambers. I have had the pleasure of interacting with Nia in both professional and personal settings. She is knowledgeable, poised, and inquisitive. I am confident she will be an outstanding law clerk and exceptional attorney.

During her last year as an undergraduate, Nia interned in my chambers at the Orphan's Court of Montgomery County. Her internship tasks included observing proceedings, creating and editing literature for publication or dissemination to justice partners, researching relevant law, writing memoranda on various topics, and summarizing petitions. Despite her limited legal training, her work product always aided my decisions. For example, the designation of trust beneficiaries was an issue before the Court. A company claimed to have an interest in the trust that trustees argued expired years prior. Nia was given the company's petition to summarize along with the estate document in question. She analyzed the documents and wrote a succinct, informative and detailed summary. She also identified a clause in the estate document that clearly settled the issue of the company's interest. Her summary expertly aided my adjudication of the case. Nia also brought a unique energy to the office: She constantly asked meaningful questions, volunteered for tasks, and consistently produced quality work product. Nia's time in the Orphan's Court left a lasting impression on my staff, in addition to myself. She truly embodies all the best qualities of a law clerk.

On a personal level, I have had the pleasure of knowing Nia for many years in our community setting, where I have always been impressed with her compassionate and well-disciplined behavior. She is deliberate and thorough in her decision-making, but strong in her choices. I have seen her grow over the years from a young student to a mature adult. It is without hesitation that I recommend her, certain that she will be an extremely valuable addition to your chambers.

Respectfully,

Cheryl L. Austin

Cheryl Austin - Judge.Cheryl@montgomerycountypa.gov

June 16, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write in support of Nia Coleman's application for a judicial clerkship. Nia was a student in my Civil Procedure I course. She is a terrific student and highly regarded member of our community. Nia possesses great legal talent and would be an asset to your chambers.

Nia is conscientious, dedicated, and thoughtful. She routinely demonstrates a sophisticated and nuanced understanding of the law, and always provides careful and thorough legal analysis. Nia has impressive analytical skills and can address complicated questions of law in an organized, clear fashion. As a first-year law student, Nia distinguished herself by routinely offering insightful comments that showcased her commitment to mastering the material and to becoming the best lawyer she can be. I recall commenting, more than once, that Nia demonstrated an understanding of Civil Procedure that belied her status as a first-year law student! Nia is able to produce polished, well-reasoned, and professional written analysis in an efficient manner. She is also an enthusiastic student of the law and engages the material with depth and passion. In addition to her outstanding analytical abilities, Nia is a gifted public speaker who provides clear and effective analysis and argument.

In addition to her talent in the classroom, Nia is a well-respected member of our community. She is a student leader who participates in the Student Bar Association and the Black Law Student Association among other activities. She is known for her professionalism, collegiality, and kindness. Simply put, Nia is one of the kindest and most hard-working students I have encountered in thirteen years on the faculty, and she will be an excellent addition to any chambers, law firm, or other organization lucky enough to hire her.

Please do not hesitate to contact me at the above-listed telephone number if I can provide any additional insight into Nia's qualifications.

Very truly yours,

/s/Mary E. Levy

Practice Professor of Law

Mary Levy - lcareer@temple.edu